Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

MARY PATRICK LATHAM,

Petitioner,

v.

THE OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF OHIO, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER CERTIORARI IS NECESSARY TO RESOLVE THE RECOGNIZED SPLIT AMONG THE CIRCUITS OVER WHETHER THE *PICKERING* BALANCING TEST FAVORS PUBLIC EMPLOYERS AS A MATTER OF LAW IN TERMINATIONS OF "CONFIDENTIAL" OR "POLICY MAKING" EMPLOYEES FOR SPEECH ON MATTERS OF PUBLIC CONCERN?

2. WHETHER THE *ELROD/BRANTI* RULE APPLICABLE TO TERMINATIONS OF PUBLIC EMPLOYEES BASED ON POLITICAL AFFILIATION SHOULD BE EXTENDED TO PERMIT THE TERMINATION OF "CONFIDENTIAL" OR "POLICY MAKING" PUBLIC EMPLOYEES FOR SPEECH ON MATTERS OF PUBLIC CONCERN?

3. WHETHER CERTIORARI IS NECESSARY TO ENSURE CONSISTENCY AMONG THE CIRCUIT COURTS REGARDING THE PROPER CONSTITUTIONAL ANALYSIS TO BE APPLIED IN CHALLENGES TO THE TERMINATION OF PUBLIC EMPLOYEES ON ACCOUNT OF THEIR SPEECH IN LIGHT OF THE GRANT OF CERTIORARI IN *GARCETTI V. CEBALLOS*, 125 S. CT. 1395 (2005), IN WHICH THE NINTH CIRCUIT ALLOWED A FIRST AMENDMENT CLAIM BY A PUBLICLY EMPLOYED ATTORNEY TO PROCEED?

PARTIES TO PROCEEDING

The Petitioner is Mary Patrick Latham. The Respondents are the Office of Attorney General, State of Ohio, Betty Montgomery, Helen Mac Murray, William Klatt and Randal Berning.

RULE 29.6 STATEMENT

The Respondents are the State of Ohio and individuals with no corporate affiliations.

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JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on January 10, 2005. (App. 3a-19a). On April 1, 2005, the Sixth Circuit denied the petition for rehearing en banc. (App. 1a – 2a). This petition is filed within 90 days of the entry of judgment pursuant to 28 U.S.C. § 1201(c) and U.S. Supreme Court Rule 13.1. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983, provides, in pertinent part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities

secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

STATEMENT OF THE CASE

A. Petitioner's Early Career With The Ohio Attorney General's Office.

Petitioner, Mary Patrick Latham, was hired by the Ohio Attorney General ("OAG") in 1987 to work in the office's consumer protection section out of its Cincinnati, Ohio office. The OAG maintained executive, supervisory and staff levels of employment. The executive level employees were hand-picked by the OAG. Their essential role was to "set policy." The supervisory level consisted of twenty-five section chiefs and three managing attorneys. The primary job of individuals holding these positions was to manage the sections and to coordinate activities with the executive level. The section chiefs were viewed by the OAG as the major conduits of policy implementation who represented the OAG in a "highly symbolic way." Staff employees were comprised of line attorneys, administrative staff, support personnel, paralegals and secretaries. Petitioner was, at all times, a line attorney, and thus a staff level employee.

In 1995, voters elected Betty Montgomery to the position of OAG. When General Montgomery assumed that position, she replaced every executive level attorney and most of the attorneys from the supervisory level. However, only one of the 300-400 staff attorneys was replaced. General Montgomery prided herself on not making retention or hiring decisions at this level on the basis of political affiliation. These staff attorneys needed authority from supervisors to open a case file, to file a complaint, to prepare a brief, to

express policy, to advance legal positions and to settle a case. A staff attorney could not and did not represent the OAG before the state legislature; nor was the staff attorney permitted to speak on behalf of the office in public settings or to the press. Petitioner's role as a staff attorney was described by Attorney General Montgomery herself as nothing more than the "cavalry in our army."

Between 1987 and 1995, Ms. Latham distinguished herself as a vigorous advocate for Ohio consumers and received high praise from her superiors. She was characterized as "appropriately assertive" and commended for being "one of the few" assistant attorney generals to generate "new ideas and projects with regularity." Indeed, the record includes an affidavit from Ms. Latham's former supervisor, who went on to become the U.S. Attorney for the Southern District of Ohio, confirming Petitioner's skill and dedication, as well as the complete absence of any misconduct or insubordination. In 1989, Petitioner helped obtain a reported ruling of statewide impact in a case involving the pest control industry invalidating so called "warranties" that limited the provider's obligation to "retreatment only" in the event of destruction of a homeowner's property by future pest damage. *State ex rel. Celebrezze v. Ferraro*, 63 Ohio App.3d 168, 578 N.E.2d 492 (1989) ("Allied I"). Petitioner was specifically encouraged to continue her pursuit of cases with such state-wide impact for Ohio consumers.

B. Petitioner's Protected Speech Within The Attorney General's Office.

In the Spring of 1995, Petitioner was engaged in litigation of state-wide impact that grew out of the pest-control decision she obtained in 1989 ("Allied II"). Indeed, the ruling was being challenged by the very company, Allied Pest Control,

that had been the subject of the original ruling. In the course of this matter Petitioner drafted a memorandum entitled "My Thoughts About The Consumer Protection Service in The Montgomery Administration." The memorandum identified Petitioner's concerns related to the OAG's handling of matters generally pertaining to exterminating companies in Ohio. In her memorandum, Petitioner suggested that other staff members be asked to contribute additional input into these various matters of concern. The memorandum was directed to the acting head of the OAG's consumer protection section. Petitioner's memo accomplished its intended effect. The acting head of the section held a staff meeting in which she followed some of Petitioner's recommendations and solicited suggestions for further attorney and staff meeting topics.

In July 1995, however, Petitioner was instructed to allow her co-counsel to negotiate a settlement of the case rather than enforce the previous ruling against exterminating companies that had been identified as flagrant violators of consumer protection practices. Petitioner followed orders and acceded to the settlement without disruption or complaint. However, Petitioner was troubled by what she perceived as a failure of the OAG's office to fulfill its statutory duty to protect Ohio consumers by allowing an important precedent to be undermined. Accordingly, on her own time and from her home, Petitioner drafted a letter to Attorney General Montgomery. Petitioner's letter was not disseminated to the public or outside her chain of command at the OAG.

In her letter (App. 31a-37a), Petitioner expressed that she was writing "to discuss the terms of the settlement (reached with the exterminating company) and the manner in which the settlement was achieved." Petitioner expressed her belief that "an injustice to consumers" had occurred and that she had felt "powerless to avert it." Petitioner went on to explain the

history of the case and its attendant legal and policy issues. Petitioner then acknowledged that "[t]he section chief is in charge and has the right to direct the attorney handling a case and to provide guidance for settlement negotiations." However, Petitioner stated that in her view "those rights are not fairly asserted when they are initiated in the final days of trial preparation and are based only on bare bones knowledge of the case." Petitioner made clear that "[t]his is one of the problems this letter is intended to address." The "more significant problem" according to Petitioner, was that "the Consumer Protection section is a 'no guts' law enforcement agency. Cases are filed with greater emphasis on modifying the supplier's behavior than reimbursing consumers." Petitioner concluded her letter by apologizing for its length (4 pages in the original) and stating that she believed "someone needed to tell you (General Montgomery) how the section (Consumer Protection Section) really operates." General Montgomery did not respond to the letter nor did she advise Petitioner at the time that the letter was in any way inappropriate. However, it is conceded that Petitioner's letter played a role in the ultimate decision to terminate her employment some time later. Indeed, her supervisor admitted as much and General Montgomery stated that Petitioner's letter "sort of reflected the whole frustration I had with Mary Pat."

C. Petitioner's Termination And This Litigation.

In 1997, purported issues arose concerning Petitioner's job performance and her relationship with OAG staff members. These difficulties came to a boil in part by virtue of an internal complaint of age discrimination filed by Petitioner after she had been twice passed over for promotion to a "senior" level staff position. Following two contentious meetings at the end of 1997 between Petitioner and her

section chief, General Montgomery terminated Petitioner's employment. Petitioner then filed this lawsuit in federal court under the Age Discrimination in Employment Act ("ADEA") alleging that her termination was motivated by considerations of her age as well as retaliation for having registered complaints of age discrimination with the OAG.[1] That complaint was amended to include a First Amendment claim under 42 U.S.C. §1983 alleging that Petitioner's termination was an act of retaliation for sending the "no guts" letter to General Montgomery in 1995. General Montgomery expressly acknowledged in the ensuing litigation that the letter written by Petitioner in 1995 had played a role in her decision to terminate Petitioner's employment.

D. The District Court Easily Denied Summary Judgment On Petitioner's First Amendment Claim And Then Reversed Itself As A Result Of The Sixth Circuit's Holding in *Rose v. Stephens*.

In January 2002, the district court declined to dismiss Petitioner's First Amendment retaliation claim on summary judgment finding that a genuine issue of fact existed, citing "deposition testimony by Attorney General Montgomery and Defendant MacMurray supporting the inference that the letter was a substantial factor in their decision to fire Ms. Latham."

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[1] Mary Patrick Latham was born on January 3, 1938. After working as a high school teacher, raising a family and working with her husband at the newspaper they owned together, Ms. Latham began law school in 1981 at the age of 43. Upon graduating in 1984, Ms. Latham clerked for the Clermont County Court of Common Pleas, where she received the court's highest commendation. She joined the Ohio Attorney General's Cincinnati office on April 13, 1987.

Five months later, and three weeks prior to the scheduled trial date on the First Amendment retaliation claim, the Sixth Circuit Court of Appeals issued its ruling in *Rose v. Stephens*, 291 F.3d 917 (6th Cir. 2002).[2] In the wake of that decision the OAG filed a second motion for summary judgment arguing that *Rose* effectively foreclosed Petitioner's First Amendment retaliation claim as a matter of law. The district court agreed with the OAG that *Rose* was dispositive of the case noting that the Sixth Circuit had now extended the *Elrod/Branti*[3] exception to terminations based upon an employee's political or policy views where the discharged employee holds a confidential or policy making position. Moreover, despite evidence that Petitioner was not, in fact, a "policy maker" (including General Montgomery's own testimony to that effect), the district court evidently felt compelled by the *Rose* decision to hold that the language of Petitioner's standard form position description, rather than her actual duties, controlled, making her a "policy maker" *as a matter of law* subject to termination under *Elrod/Branti*. Thus, the Sixth Circuit's decision to take one side of a split

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[2] The Sixth Circuit's decision in *Rose* represented a clear departure from its prior rulings. *See Johnson v. University of Cincinnati*, 215 F.3d 561, 583-85 (6th Cir. 2000). According to one commentator, "These lower courts [including the Sixth Circuit] have transported the Supreme Court's analysis for political patronage dismissals to speech-based terminations. In doing so, they have eliminated the ad hoc balancing analysis and insulated the employer from liability in all cases where policymakers are dismissed for their speech." Whitney C. Gibson, *Rethinking the Sixth Circuit's Erosion of First Amendment Rights in Rose v. Stephens*, 72 U. Cin. L. Rev. 767, 777 (2003)

[3] *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980).

among the circuits regarding the application of the *Elrod/Branti* exception was directly dispositive in this case, leading to the dismissal of Petitioner's claim.

E. The Sixth Circuit Affirmed, Joining The Fourth, Ninth and Seventh Circuits And Splitting With The Second, Third, Fifth and Tenth Circuits.

On appeal, the Sixth Circuit Court of Appeals affirmed the district court stating that "[B]ecause Latham is a policymaking employee, our holding in *Rose,* that policymaking employees may be terminated for their speech and/or policy affiliation without offending the First Amendment rights under *Elrod/Branti* applies." (App 16a-17a) Therefore, "even had Latham been terminated solely on the basis of the 1995 letter expressing her views of the then current OAG policies, her First Amendment rights were not violat[ed] . . ." *Id.* The Sixth Circuit denied Petitioner's motion for reconsideration and rehearing *en banc*. (App 1a- 2a)

In February 2005, the Court granted a Writ of Certiorari in the case of *Garcetti v. Ceballos* (Docket 04-473). The question presented in *Garcetti v. Ceballos* is: "does the First Amendment protect the speech of a deputy district attorney who wrote and circulated a memorandum suggesting that a deputy sheriff lied in the search for an affidavit and his subsequent testimony at court?" In *Ceballos v. Garcetti* , the Ninth Circuit reversed a district court's dismissal of a deputy district attorney's First Amendment retaliation claim holding in pertinent part that the right of a publicly employed attorney to be free from retaliation for purely internal speech to a limited audience relating to potential corruption in a public office is clearly established for purposes of a qualified immunity analysis. *Ceballos v. Garcetti*, 361 F.3d 1168, 1170 (9th Cir. 2004). Significantly, the Ninth Circuit did not

hold that a publicly employed attorney is a confidential or policy-making employee as a matter of law as did the Sixth Circuit in the instant case. Had the Ninth Circuit held that Ceballos was such an employee, it would have been compelled by its prior rulings to dismiss Ceballos' claims without consideration of the balancing test required by the Court in *Pickering v. Board of Education*, 391 U.S. 563 (1968), which weighs the free speech rights of public employees against the government's interest in efficient service. *See Fazio v. City and County of San Francisco,* 125 F.3d 1328, 1332 (9th Cir. 1997).

Resolution of the issue in *Garcetti v. Ceballos* will not resolve the split among the circuits exemplified by the Sixth Circuit's decision in *Rose* and the instant case because *Garcetti* could be resolved on a more limited basis (i.e., the effect of the limited audience to whom the speech was directed). A decision on that issue will not end the divide between the circuits or eliminate the inconsistency in federal jurisprudence on the issue of free speech rights of public employees. The right of public employees to speak out on matters of policy cannot be clearly discerned until the Court provides guidance to the circuits as to 1) what speech by public employees is protected, as raised by *Garcetti*; 2) which employees are entitled to make such speech, and 3) what weight such speech deserves in contrast to the government's interest in promoting efficiency of its service by regulating the speech of its employees, as raised by this appeal. This coupling of cases would provide a unique opportunity for the Court to clarify the free speech rights of public employees and the judicial analysis required to reconcile those rights against the government's authority to regulate speech. Accordingly, this Petition for Writ of Certiorari has been filed.

REASONS FOR GRANTING THE WRIT

I. Review Is Appropriate Because The Courts of Appeal Have Extended This Court's Decisions In Political Patronage Cases, i.e., *Elrod* and *Branti*, Into The First Amendment Speech Context Contrary To This Court's Holding In *Pickering* And Its Progeny Which Direct The Courts To Conduct A Balancing Test.

The public interest in having free and unhindered debate on matters of public importance is "the core value of the Free Speech Clause of the First Amendment." *Pickering*, 391 U.S. at 573. The categorical application of the *Elrod/Branti* rule adopted by the Sixth and other circuits with respect to public employee First Amendment free speech claims permits unconstitutional infringements upon this core right and is inconsistent with the precedents of this Court which hold that such bright lines cannot be drawn in speech cases.

In *Connick v. Myers*, 461 U.S. 138 (1983), which involved speech by a publicly employed attorney, the Court reiterated the following language of the *Pickering* court:

> Because of the enormous variety of fact situations in which critical statements by . . . public employees may be thought by their superiors . . . to furnish grounds for dismissal, we do not deem it either appropriate or feasible to lay down a general standard against which all such statements may be judged.

Connick, 461 U.S. at 154 (ellipses in original).

Four years later in *Rankin v. McPherson*, 483 U.S. 378 (1987). the Court ruled that the nature of an employee's

responsibilities is a factor to consider when balancing interests under *Pickering*.

> In weighing the State's interest in discharging an employee based on any claim that the content of a statement made by the employee somehow undermines the mission of the public employer, some attention must be paid to the responsibilities of the employee within the agency. The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails.

Rankin, 483 U.S. at 390.

In *Rankin*, the Court rejected a categorical rule which would have insulated the employer from liability for firing deputized employees due to their speech in much the same manner as those since adopted by the courts of appeals. *Id.* at 391 n. 17. The *Rankin* Court also noted that there is no categorical rule that low level employees may not be terminated for the content of their speech. *Id.* at 391 n. 18.

Ultimately, the balancing analysis required by *Pickering* must be performed when an employee's speech is at issue. The Court has already carved out an exemption exclusive to the free speech rights of high ranking or confidential employees based on the "raw test of political affiliation" (i.e., *Branti* and *Elrod*). Heretofor, the Court has strongly indicated that in all other speech cases "the balancing *Pickering* mandates will be inevitable." *O'Hare Truck Svce. Inc. v. City of Northlake*, 518 U.S. 712, 719 (1996). Nevertheless, several courts of appeals have sidestepped the Supreme Court's holdings and have held, in various formulations, that "policy making" or "confidential" public

employees may be terminated for their speech despite protests that such categorical rules are constitutionally impermissible. *See e.g. Jenkins v. Medford*, 119 F.3d 1156, 1165-71 (4th Cir. 1997) (en banc) (Motz, J., dissenting); *See also Bonds v. Milwaukee County*, 207 F.3d 969, 983-88 (7th Cir. 2001)(Cudahy, J. dissenting).[4]

The result is that the federal courts have effectively done through their decisions what this Court held Congress could not. In *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454 (1995), the Court held the "Ethics in Government Act" unconstitutional insofar as it prohibited federal employees from accepting honoraria for speaking engagements or written work. The Court first noted that:

> The sweep of § 501(b) makes the Government's burden heavy. Unlike *Pickering* and its progeny, this case does not involve a *post hoc* analysis of one employee's speech and its impact on that employee's public responsibilities. Rather, the Government asks us to apply *Pickering* to Congress' wholesale deterrent to a broad category of expression by a massive number of potential speakers.

Id. at 466-67.

The Court went on to conclude that the prohibition on honoraria was unconstitutional because it deterred speech by public employees, not based on its actual disruptive effect as gauged by the *Pickering* balancing test, but on the speculative

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[4] Petitioner commends to the Court's consideration Judge Cudahy's dissent, which underscores the argument in favor of certiorari raised here.

assumption that such speech might be disruptive, an assumption which the Court found unconstitutionally broad:

> The honoraria ban as applied to respondents burdens speech far more than our past applications of *Pickering* because the ban deters an enormous quantity of speech before it is uttered, based only on speculation that the speech might threaten the Government's interests.

Id. at 467.

Just as the Ethics in Government Act was found to have threatened speech, so too should the categorical rules adopted by several courts of appeals be found to deter speech due to the judicially imposed irrebuttable presumption that such speech disrupts government efficiency. This presumption, of course, is itself constitutionally infirm. *See Waters v. Churchill*, 511 U.S. 661, 664 (1994) ("Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions.").

As this case illustrates well, speech on matters of policy by ostensible "policy makers" does not have to be disruptive – it can be productive. Petitioner sent her memo solely to those above her in the chain of command within the Ohio Attorney General's Office. She neither publicized it to private citizens nor distributed it to any of the other assistant attorneys general. No disruption resulted with the exception of Petitioner's superiors learning that, in the view of Petitioner, the OAG's business-friendly policies were

sacrificing the interests of Ohio consumers.[5] Clearly, there are ways in which truly disruptive speech can be deterred without resort to the heavy-handed rules adopted by several courts of appeals which allow public entities to prohibit speech by a large class of employees on a wholesale basis. It is an axiom of constitutional jurisprudence that a regulation impinging upon content-based speech should be narrowly tailored to achieve the government's interest while minimizing restrictions on the protected right. *See U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000). Accordingly, certiorari is needed to bring the courts of appeals back into compliance with the rulings of this Court and ensure the consistent and appropriate protection of public employees' First Amendment rights.

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[5] In this regard, Petitioner's conduct can be easily contrasted with the conduct of the attorney at issue in *Connick v. Myers*, 461 U.S. 138 (1983). In *Connick*, the speech at issue was a questionnaire on issues of office moral and transfer policy sent to many members of the district attorneys office by an attorney upset about a proposed transfer. Thus, the Court concluded that the speech at issue did deal with a matter of significant public concern and was disruptive. In contrast, Petitioner's memo dealt with substantive policy issues concerning the protection of Ohio consumers by the office statutorily charged with the duty to enforce consumer protection laws. Moreover, the distribution of Petitioner's memo was limited to a few key individuals and had no impact whatsoever on the functioning of the office.

II. This Case Presents the Opportunity To Resolve The Split Among The Circuits Over Whether Public Employees Lose Their First Amendment Speech Rights Upon Accepting Ostensibly "Confidential" Or "Policy Making" Positions And, If So, To Provide Guidance To The Federal Judiciary As To How Such Positions Are Properly Identified.

This case illustrates the inconsistency caused by the split among the circuits in public employee First Amendment speech cases. Prior to the Sixth Circuit's decision in *Rose*, the district court easily denied summary judgment based on the record in this case. However, the Sixth Circuit's decision in *Rose* to adopt the rule embraced by the Fourth, Seventh and Ninth Circuits compelled dismissal on the eve of trial.[6] The free speech rights of public employees are very different depending upon the federal jurisdiction in which the employee works. Certiorari is needed to bring consistency to this area of the law.

A. The Split Among The Circuits Is Clear And Recognized.

In a 2004 decision, the Fourth Circuit Court of Appeals noted the different approaches adopted by the various Circuits. *See Curinga v. City of Clairton*, 357 F.3d 305, 313 n. 8 (3d Cir. 2004) ("[T]he other courts of appeals have taken somewhat different approaches to similar fact situations. The

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[6] Indeed, the district court noted that the Sixth Circuit had not specifically addressed this issue before and that the decision in *Rose* "extended the *Elrod/Branti* exception to dismissals based on a government employee's speech on policy or political issues." (App. 28a)

Fifth, Tenth and Eleventh Circuits have applied the *Pickering* test . . . The First, Second, Sixth, and Seventh Circuits have upheld terminations or other disciplinary measures taken by the government under the *Elrod/ Branti* exception . . ."). *See also Rose v. Stephens*, 291 F.3d 917, 921 (6th Cir.) ("Three distinct approaches have emerged among the federal courts of appeal that have addressed the question of how to deal with situations where both the *Connick* and *Elrod/Branti* lines of cases potentially apply."). A review of the caselaw reveals two general schools of thought, as well as a number of subcategories, caveats and inconsistencies.

Four of the thirteen Circuits (the Fourth, Sixth, Seventh and Ninth) have held that a public employee's classification as "confidential" or "policy making" is determinative of a First Amendment speech claim by such an employee contrary to and without regard for the balancing test mandated by *Pickering*, 391 U.S. 563. *See Jenkins*, 119 F.3d at 1169 (en banc)[7]; *Vargas-Harrison v. Racine Unified School District*, 272 F.3d 964 (7th Cir. 2001) (citing *Bonds v. Milwaukee County*, 207 F.3d 969, 977 (7th Cir. 2001); *Biggs v. Best, Best &* Krieger, 189 F.3d 989, 994-95 (9th Cir. 1999) (citing *Fazio,* 125 F.3d at 1333; *Rose*, 291 F.3d at 922-23. Notably, however, the Sixth and Seventh Circuits appear to limit their abrogation of *Pickering* to cases in which the speech at issue

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[7] The divergence of opinion on this issue was specifically noted in a dissent to the Fourth Circuit's *en banc* opinion joined by four members of the court criticizing the majority holding for extending the *Elrod/Branti* line of cases and failing to follow *Pickering*. *See Jenkins*, 119 F.3d at 1165-71 ("The majority notes that 'lower courts have issued conflicting and confusing opinions' . . . At least some of these inconsistencies can be laid at the feet of courts, like today's majority.")

concerns policy or political issues. *Rose*, 291 F.3d at 922-23; *Bonds*, 207 F.3d at 979.[8]

On the other hand, the First, Second, Third, Fifth and Tenth Circuits have declined to hold that "confidential" or "policy making" status is itself *dispositive* of a public employee's First Amendment speech retaliation claim, preferring to incorporate such status as a factor to consider when performing the balancing analysis required by *Pickering* thereby stopping short of extinguishing the speech rights of an entire class of public employees. *See Flynn v. City of Boston*, 140 F.3d 42 (1st Cir.), *cert. denied*, 525 U.S. 961 (1988)[9];

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[8] This refinement of the *Elrod/Branti* exception appears to limit the scope of its application. To the contrary, it creates a state of uncertainty for public employees. In order to avoid application of the rule adopted by the Sixth and Seventh Circuits, a party must contend that his or her speech was not on a policy or political issue. As a result, however, the speech will likely not constitute a matter of public concern so as to entitle the speaker to protection under *Pickering* and *Connick*. Thus, any speech worthy of First Amendment protection is effectively subject to the bright line rule adopted by the Sixth and Seventh Circuits leaving little or no real difference between these Circuits and the absolute rule adopted by the Ninth and Fourth Circuits.

[9] We note that several discussions of the split among the circuits on this issue place the First Circuit in agreement with the Fourth, Sixth, Seventh and Ninth Circuits. *See e.g.* Gibson, *supra* note 2.; *Rose v. Stephens*, 291 F.3d 917, 921 (6th Cir. 2002). Petitioner submits that the First Circuit's position remains respectful of the Court's decision in *Pickering* by continuing to mandate a balancing test. In *Flynn v. City of Boston*, the First Circuit first held that the plaintiffs, an agency director and an operations director, could be terminated because of their political affiliations under the *Elrod/ Branti* line of decisions following a change in the City's

McEvoy v. Spencer, 124 F.3d 92, 101 (2d Cir. 1997) ("Where the evidence shows that the employer discharged a policymaker solely for speaking out on matters of public concern, and that the policymaker's political beliefs played no role in the employer's decision, *Elrod* is inapplicable and *Pickering* must be applied"); *Barker v. City of Del City*, 215 F.3d 1134, 1139 (10th Cir. 2000) (citing *Jantzen v. Hawkins*, 188 F.3d 1247 (10th Cir. 1999) for proposition that "our circuit has similarly implicitly endorsed the idea that the two different analyses [*Pickering* balancing and *Elrod/Branti* patronage exception] remain distinct and separate."); *Curinga v. City of Clairton*, 357 F.3d 305, 313 n. 8 (3d Cir. 2004) (finding that the dispositive analysis is the *Pickering* balancing test); *Gentry v. Lowndes County, Mississippi*, 337 F.3d 481, 486 n. 7 (5th Cir. 2003) (noting that a balancing test based upon *Pickering* is appropriate for speech claims).

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administration. Noting the need to balance employees' speech interests against government employers' interests, the court went on to hold that the plaintiffs' speech "did bear on the job and their working relationship" such that plaintiffs' interests were outweighed. The First Circuit was also careful to point out that its decision "does not mean that anything goes for policy-related positions" implicitly preserving the balancing test mandated by *Pickering*. *Flynn*, 140 F.3d at 47. Far from adopting a categorical dispositive rule, the First Circuit noted that the "legal standard in this area is notoriously fuzzy." *Id.* at 46. Indeed, a subsequent First Circuit decision confirms this reading of *Flynn*: "We held that Flynn's interest in free speech, and the public's, were outweighed by the government's interest in promoting efficiency of its services, specifically the effect of the statements on those close working relationships for which personal loyalty and confidence are necessary." *Padilla-Garcia v. Rodriguez*, 212 F.3d 69, 79 (1st Cir. 2000). Clearly, the First Circuit has not adopted a test under which policy-making or confidential status is, without more, dispositive of a public employee's claim

The result of this disagreement is an inconsistency in the First Amendment rights of public employees depending upon the situs of their employment or where there claims are brought. As this case demonstrates, the effect of this inconsistency is that a case that would have gone to a jury may now be dismissed on a pretrial motion. Certiorari is necessary to bring consistency to the law and ensure that public employees subjected to retaliation for speaking on matters of public concern are afforded due process with respect to such claims.

B. This Case Exemplifies The Effect Of The Erroneous Rule Adopted by Several Circuits Because Petitioner Was Not, In Fact, A "Confidential" Or "Policy Making" Employee But The District Court And The Sixth Circuit Both Effectively Held, Under *Rose v. Stephens*, That The Reality Of The Situation (i.e., the facts) Did Not Matter.

The Circuits are in clear disagreement over whether the balancing analysis mandated by *Pickering* can be dispensed with in public employee First Amendment speech cases with respect to "policy makers" and "confidential" employees. However, the inconsistencies do not end there. Even among the courts that have adopted the rule that such employees do not have any First Amendment rights, there are disagreements.

For example, who is a "policy maker" or "confidential" employee is far from clear, and the methodology for determining whether a particular claimant satisfies the varying tests is equally unsettled. For example, in the instant case, the Sixth Circuit considered whether the Petitioner fell within four categories of employees "that will always fall within the *Elrod/Branti* policy making or confidential employees

exception." (App. 11a).[10] Other circuits have taken different approaches.[11] The Sixth Circuit has also held that, in applying its test, the "inherent duties of the position" and not the actual duties of the litigant, control. The result is even more pernicious from a First Amendment perspective if the uncertain and loose standard governing an employee's "confidential" or "policy making" status is permitted to

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[10] The four categories are: 1) Positions specifically named in relevant federal, state, county, or municipal law to which discretionary authority with respect to the enforcement of that law or the carrying out of some other policy of political concern is granted; 2) Positions to which a significant portion of the total discretionary authority available to category one position-holders has been delegated; 3) Confidential advisors who spend a significant portion of their time on the job advising category one or category two position-holders on how to exercise their statutory or delegated policymaking authority; and 4) Positions that are part of a group of positions filled by balancing out political party representation, or that are filled by balancing out selections made by different governmental agents or bodies. (App. 11a-12a).

[11] For example, in determining whether a position is policy making, the Ninth Circuit considers factors such as "vague or broad responsibilities, relative pay, technical competence, power to control others, authority to speak in the name of policy makers public perception, influence on programs, contact with elected officials, and responsiveness to partisan politics and political leaders." *Fazio,* 125 F.3d at 1334 n.5 (citing *Hall v.Ford,* 856 F.2d 255, 262 (D.C.Cir. 1988)). The Seventh Circuit classifies an employee as a policy maker when the "individual authorizes, either directly or indirectly, meaningful input into government decisionmaking on issues where there is room for principled disagreement on goals or their implementation." *Warzon v. Drew,* 60 F.3d 1234, 1239 (7th Cir. 1995) (quoting *Nekolny v. Painter,* 653 F.3d 1164, 1170 (7th Cir. 1981)).

sweep so broadly across the employment spectrum that a public employee's constitutional right to free speech in the workplace hinges entirely on a formal job description or title.

In reaching this conclusion, the Sixth Circuit deviated from the patronage cases which, more searchingly, hold that the *actual* duties *of the position*, not the "inherent" duties or the duties of the incumbent in the position, determine whether it is confidential or policy making. *See Faughender v. City of N. Olmsted*, 927 F.2d 909, 913 (6th Cir. 1991) ("By declaring Faughender's position to be "confidential" based on its close working relation with the mayor's office, the district court failed to closely examine the actual duties and the political requirements, if any, of her position as required by *Branti*"). Here General Montgomery unequivocally admitted in deposition that Petitioner and other assistant attorneys general had little or nothing to do with policy. Had the Sixth Circuit adhered to *Faughender*, and applied a more functional analysis of Petitioner's role, *Rose* would have been decided differently.

This distinction highlights a key difference between patronage and speech cases. It makes sense to consider what duties an employee *may* exercise in the patronage context because the newly elected or appointed official may expect more or different service from the employee than did his or her predecessor. Thus, the duties actually performed by the incumbent are not necessarily informative to deciding whether the position is confidential or policy making, whereas the possible duties are. However, in a speech case where there has been no change of regime and there is no expectation that the duties of the position may change, there is no reason to consider anything other than the actual duties of the incumbent or others in similar positions.

Under *Rose* and the Sixth Circuit's decision in this case, the determination of whether an employee is a policy maker or confidential employee can be made as a matter of law, without regard for evidence in the record indicating otherwise. *See also Bonds*, 207 F.3d at 983-88 (7th Cir. 2001)(Cudahy, J. dissenting). Presumably then, a public employer can completely foreclose speech claims by its employees by including language in their position descriptions to the effect that they advise policy makers. Regardless of the truth of the situation, claims by such individuals will be analyzed under the bright line rule without the benefit of any factual analysis of the balancing mandated by *Pickering*. The result is a wholesale abandonment of the First Amendment rights of large numbers of public employees.

III. Review Is Appropriate To Ensure Compliance With And The Consistency Of This Court's Rulings Because The Sixth Circuit's Decision In This Case Potentially Conflicts With The Ninth Circuit's Decision In *Ceballos v. Garcetti* Which Is Presently Before The Court.

In *Garcetti v. Ceballos,* the Court is presented with the opportunity to address the protections of public employee job-related speech in the public interest made to an internal agency audience under the *Pickering* balancing test. However, the Ninth Circuit did not reach the question of whether the employee was a policy making or confidential employee under *Elrod/Branti*. Without further guidance, the Court's decision in *Garcetti v. Ceballos* would permit continuing inconsistency in analysis among the circuits in the interplay and balance of what speech by public employees is protected, as raised by *Garcetti,* and which employees are entitled to such speech and the weight such speech deserves in counterbalance to the government's interest in promoting the efficiency of its service, as raised by this appeal.

Granting this petition will give the Court the occasion to clarify the judicial analysis required to reconcile these factors in balancing the free speech protections of public employees against the government's interest in regulating speech.

CONCLUSION

This case presents an opportunity to directly address a bona fide split among the circuits concerning an issue of critical and fundamental significance: the protected status of speech of individuals employed in the public service. Moreover, the *Elrod/Branti* exception applied to terminations based on speech alone threatens to swallow traditional First Amendment jurisprudence which requires that the free speech rights of public employees be balanced against the government's interest in regulating employee speech. *See O'Hare,* 518 U.S. at 2357-58. The net effect of expanding *Elrod/Branti* is that well-intentioned and constructive criticism from "policymaking" employees will become tantamount to blasphemy — speech never to be uttered in the presence of the sovereign for fear of punishment.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 03-3830

[Filed, April 1, 2005]

MARY PATRICK LATHAM, Plaintiff-Appellant,	)
v.	)
THE OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF OHIO, ET AL., Defendants-Appellees.	)

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully

considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 03-3830

[Filed, January 10, 2005]

MARY PATRICK LATHAM,)
Plaintiff-Appellant,)
)
v.)
)
THE OFFICE OF THE)
ATTORNEY GENERAL OF)
THE STATE OF OHIO, et al.,)
Defendants-Appellees.)
)

OPINION

R. GUY COLE, JR., Circuit Judge. Plaintiff-Appellant Mary Patrick Latham appeals the district court's grant of summary judgment in favor of Defendants-Appellees Office of the Attorney General of the State of Ohio ("OAG") and others. Latham brought this action against the OAG claiming that its termination of her employment violated both her First Amendment rights and the anti-retaliation provisions of the Age Discrimination in Employment Act of 1967 ("ADEA"). The district court granted summary judgment in favor of the defendants on both claims. Because Latham's position is

properly viewed as a "confidential or policymaking" position, and because plaintiffs are barred from recovering damages against a State under the ADEA, we hereby AFFIRM the judgment of the district court.

I.

Mary Patrick Latham was hired as a consumer protection attorney in the OAG's Cincinnati office on April 13, 1987. While she reported to a section head in the OAG's main office in Columbus, she was the only consumer protection attorney in Cincinnati. As an assistant attorney general, her duties included, *inter alia*, preparing, presenting, and arguing cases; assisting settlement negotiations, and making recommendations to her superiors as to how best to protect Ohio consumers. However, she required approval from supervisors in the Columbus office before opening a case file, filing a complaint, submitting a brief, or initiating or finalizing a settlement. Latham was also not allowed to speak to the press on behalf of the OAG.

On July 17, 1995, trial was scheduled to begin in a case brought by the OAG against Allied Pest Control for enforcement of a consent judgment. Latham was assigned to conduct the trial on behalf of the OAG. In the weeks before the scheduled trial date, she was informed that Robert Hart, an assistant attorney general based in Columbus, would be handling settlement negotiations between the parties, with an eye towards avoiding a trial altogether. The day the trial was to have begun, the parties settled the case.

That night, Latham drafted a letter ("the 1995 letter") to Attorney General Betty Montgomery, outlining concerns she had with both the Allied settlement and the general direction of the Consumer Protection Section. On the following day,

July 18th, she sent the letter to Montgomery, forwarding copies to Robert Hart, Randal Berning (head of the OAG's Cincinnati office), and Eric Brown (then-acting head of the Consumer Protection Section, and Latham's immediate supervisor). Latham received no reply or other response to her letter.

The next month, Brown was replaced as head of the Consumer Protection Section by Helen MacMurray. Two years later, in the fall of 1997, Latham, MacMurray, and Berning had a series of meetings, at which MacMurray raised concerns about Latham's job performance and relationship with other OAG staff members. The parties dispute the tenor of these meetings, but it is undisputed that Latham was upset at MacMurray's allegations. Following one of these meetings, Latham filed an age-based discrimination complaint with the OAG, alleging that the OAG (through Berning and MacMurray) failed to promote her and kept her from being involved in certain cases because of her age. Finally, after a contentious meeting regarding a complaint about Latham made by another OAG staff member, Attorney General Mongomery terminated Latham's employment on January 2, 1998.

Latham brought suit in federal court, alleging, after two amendments to her complaint, that her discharge was both a violation of the ADEA and of her First Amendment rights under 42 U.S.C. § 1983. The district court granted summary judgment on the ADEA claim on Eleventh Amendment grounds, and then, upon the release of our decision in *Rose v. Stephens*, 291 F.3d 917 (6th Cir. 2002), several weeks before the scheduled trial of the instant case, granted summary judgment on the First Amendment claim. This appeal followed.

II.

A. Standard of Review

As always, this Court reviews grants of summary judgment *de novo*. *Farhat v. Jopke*, 370 F.3d 580, 587 (6th Cir. 2004). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

B. Section 1983 First Amendment Retaliation Claim

Latham asserts that she was fired, at least in part, because of the 1995 letter she wrote to then-Attorney General Montgomery. Such a dismissal, she argues, violated her free speech rights under the First Amendment and 42 U.S.C. § 1983. The OAG asserts that Latham was terminated because she was disruptive in the office and could no longer be trusted to represent the OAG responsibly. However, since this appeal is from a grant of summary judgment in the OAG's favor, we must view all facts in the light most favorable to Latham. *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).As a result, we must determine if Latham's termination would result in a viable claim under 42 U.S.C. § 1983 if, in fact, she had been terminated in retaliation for the views she expressed in the 1995 letter.

It is well-settled law that public employees are not obligated to abandon all their constitutional rights as a requirement for either obtaining or retaining their employment. *See, e.g., Connick v. Myers*, 461 U.S. 138, 75

L. Ed. 2d 708, 103 S. Ct. 1684 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968)("The theory that public employment . . . may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605-06, 17 L. Ed. 2d 629, 87 S. Ct. 675 (1967)). Therefore, in order to determine whether a public employer has violated the First Amendment by firing an employee for engaging in speech, courts must balance the interests of the government as both sovereign and employer and those of the employee as citizen. *Pickering*, 391 U.S. at 568. To do so, we first determine whether an employee's speech addresses a matter of public concern, and, if so, then balance the interests of the employer in providing effective and efficient services against the employee's First Amendment right to freedom of expression. *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1186 (6th Cir. 1995).

1. *Was the Subject of Latham's Speech a Matter of Public Concern?*

An expression addresses a matter of public concern where its subject matter is such that the public at large would have an important interest in the issue. *Pickering*, 391 U.S. at 571. Latham's 1995 letter dealt with both her concerns about the settlement of a case and her general concerns regarding the OAG's enforcement of Ohio's consumer protection laws. It is indisputable that the enforcement decisions of the OAG in consumer protection cases, in both particular cases and generally, are a matter of public concern, and, indeed, the OAG has not disputed this issue on appeal. We thus turn to the balancing step of the *Pickering* analysis.

2. *Does Rose v. Stephens Apply To Latham's Case?*

In *Rose v. Stephens*, 291 F.3d 917 (6th Cir. 2002), we held that, as a matter of law, the second step of the Pickering test favors the governmental employer "where a confidential or policymaking public employee is discharged on the basis of speech related to his political or policy views . . . ." *Id.* at 921. *Rose* involved a § 1983 action by the Kentucky state police commissioner alleging that he was terminated in violation of his right to freedom of expression under the First Amendment when his termination was based on his refusal to withdraw a memorandum to the governor outlining Rose's reasons for eliminating the deputy police commissioner position. Considering that the Supreme Court had already allowed government employers to terminate confidential or policymaking employees solely on the basis of their political affiliation, *see, e.g., Elrod v. Burns*, 427 U.S. 347, 367, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976); *Branti v. Finkel*, 445 U.S. 507, 63 L. Ed. 2d 574, 100 S. Ct. 1287 (1980), we noted that "it would make little sense to permit the government to pre-emptively dismiss employees on the basis of political affiliation alone, while restricting its ability to respond to an overt act of disloyalty by an employee in the same position." *Rose*, 291 F.3d at 922.

Latham argues that the presumption in favor of the government that we outlined in *Rose* should not apply to her case for three reasons: (1) her speech was not made publicly; (2) her speech did not constitute insubordination or disloyalty; and, most importantly, (3) her position was not a confidential or policymaking position. We consider each argument in turn.

a. The Public Nature of Latham's Speech

First, Latham argues the speech must be public for the presumption in favor of the government to apply, and that her speech (i.e., the 1995 letter) was not public. Therefore, she claims, the presumption from *Rose* should not apply here. In fact, however, the speech at issue in *Rose* was also never made "public." Rose only sent his memorandum to his superior (the Secretary of Kentucky's Justice Cabinet) and his superior's superior (the Governor). Here, Latham's 1995 letter was also sent to her superior (the acting head of the Consumer Protection Section) and her superior's superior (Attorney General Montgomery), as well as to several other OAG attorneys. Accordingly, Latham's letter was no less public than was the speech at issue in *Rose*. Furthermore, in *Rose*, we focused on how the speech would affect the employer's ability to maintain a working relationship with his or her employees, rather than whether the speech was "public" or intra-office. *See id.* at 923. As a result, any small distinction between the public nature of Latham's speech and that of the speech in *Rose* should not affect the application of *Rose* to this case.

b. Insubordination

Next, Latham argues that, in contrast to Rose's actions, her speech did not constitute insubordination or disloyalty. Rose was fired after he refused to withdraw the memorandum he had submitted to the Secretary of the Justice Cabinet and to the Governor. Latham argues that it was Rose's *act of refusal* to withdraw the memorandum, not the memorandum's contents, that led to Rose's dismissal, and that Latham did not act in a similarly disloyal or insubordinate fashion. However, Latham misunderstands our holding in *Rose*. Had Rose been terminated merely for the act of refusing to withdraw the

memorandum regardless of its contents, then his case never would have involved a speech-related analysis. Rather, the *Rose* panel presumably would have analyzed cases in which an employee refused to follow the job-related instructions of his employer--obviously good cause for termination. However, Rose's superior obviously wanted Rose to withdraw his memorandum because of its content stating Rose's intent to eliminate the position of deputy commissioner, a position which was then occupied by a friend of the governor. *See, e.g., Rose*, 291 F.3d at 924-25. The insubordination at issue was thus Rose's *speech* on job-related matters, and as we noted in that case, "it is insubordination for an employee whose position requires loyalty to speak on job-related issues in a manner contrary to the position of his employer, and . . . employees may always be discharged for good cause, such as insubordination." *Id.* at 923.

Latham's case is, again, not significantly different. Latham speaking out on her employer's policies could have made it difficult for her employer to trust her to implement those same policies. As the Supreme Court has noted, "while as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." *Connick*, 461 U.S. at 149. While this may seem draconian at first glance, recall that, under *Elrod* and *Branti*, confidential or policymaking employees may be discharged merely for their political affiliations, without *any* on-the-job acts even hinting at disloyalty or insubordination. Viewed in that context, it would seem incongruous for us to suggest that such an employee's job-related speech would have to rise to the level of outright rebellion before termination would be valid under the First Amendment, when the same employee could be fired merely due to affiliation

with an opposing political party, whether or not the employee ever evinces any policy disagreement with the party in power. In either case, a confidential or policymaking employee would have, under *Elrod*, *Branti*, and *Rose*, placed himself in a position such that his State employer might not be able to trust him to implement fully the employer's policies. As a result, assuming Latham is found to be a policymaking or confidential employee, her conduct in speaking out against the central enforcement policies of her department, while admittedly well-intended, was sufficiently insubordinate to overcome any First Amendment bar to her termination.

c. *The Policymaking/Confidential Nature of Latham's Position*

Finally, and most importantly, Latham argues that her case is not governed by *Rose's* automatic presumption in favor of the government because she, as an assistant attorney general in the OAG, was not a "policymaking or confidential" employee. The Supreme Court has conceded that "no clear line can be drawn between policymaking and nonpolicymaking positions." *Elrod*, 427 U.S. at 367. We, however, have articulated four categories of employees who will always fall within the *Elrod/Branti* policymaking or confidential employees exception:

> Category One: positions specifically named in relevant federal, state, county, or municipal law to which discretionary authority with respect to the enforcement of that law or the carrying out of some other policy of political concern is granted;
>
> Category Two: positions to which a significant portion of the total discretionary authority available to category one position-holders has been delegated; or

positions not named in law, possessing by virtue of the jurisdiction's pattern or practice the same quantum or type of discretionary authority commonly held by category one positions in other jurisdictions;

Category Three: confidential advisors who spend a significant portion of their time on the job advising category one or category two position-holders on how to exercise their statutory or delegated policymaking authority or other confidential employees who control the lines of communications to category one positions, category two positions or confidential advisors; and

Category Four: positions that are part of a group of positions filled by balancing out political party representation, or that are filled by balancing out selections made by different governmental agents or bodies.

McCloud v. Testa, 97 F.3d 1536, 1557-58 (6th Cir. 1996). In determining whether an employee falls into one of these categories, we must examine the inherent duties of the position, rather than the actual tasks undertaken by the employee. *Williams v. City of River Rouge*, 909 F.2d 151, 155 (6th Cir. 1990); *see also Faughender v. City of N. Olmsted*, 927 F.2d 909, 913 (6th Cir. 1991) (citing many cases from other circuits).[1] While the "inherent duties of the

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[1] Latham argues that we must consider both the actual and inherent duties of the position at issue. However, this is likely to be the case only if the employment action at issue is a hiring decision where the new supervisor's conception of the actual duties of the position at issue will deviate from what they have been in the past. *See, e.g., Faughender*, 927 F.2d at 909. In addition, courts have considered the actual duties of the employee in order to determine the inherent

position" are not necessarily those that appear in the written job description and authorizing statute, such descriptions can be instructive. *See, e.g., Williams*, 909 F.2d at 154-55. Finally, a position need not fit perfectly within one of the "generic" *McCloud* categories in order to be found by a court to be a "confidential or policymaking" job. *Feeney v. Shipley*, 164 F.3d 311, 318 (6th Cir. 1999).

Latham's position, that of assistant attorney general, is authorized under Ohio Rev. Code § 109.03, which states:

> The attorney general may appoint . . . assistant attorneys general, each of whom shall be an attorney at law, to serve for the term for which the attorney general is elected, unless sooner discharged by him, and each shall perform such duties, not otherwise provided by law, as are assigned him by the attorney general.

In addition, Latham's job description, contained in her personnel file, details potential duties of an assistant attorney general, including: appearing in court on behalf of the Attorney General; presenting legal opinions to the Attorney General or other state personnel; discussing law and/or policy with the Attorney General, senior attorneys, and state clients; working with state, federal, and local officials and members of the public in order to solve legal issues; and drafting and reviewing confidential, important, and routine documents under the direction of a senior attorney. The description also notes that an assistant attorney general "must be able to

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duties of the position. *See, e.g., Gordon v. County of Rockland*, 110 F.3d 886, 888 (2d Cir. 1997).

maintain the highest level of confidential and fiduciary relationship in counseling clients and the Attorney General."

Latham's position, as a fiduciary of the Attorney General, falls sufficiently within the bounds of Categories Two and Three from *McCloud*, as a confidential advisor to, and delegatee of, a policymaking employee (here, the Attorney General) on job-related matters. Latham argues that she did not have authority to file a case or even submit a brief on behalf of the Attorney General without approval from a more senior attorney. But the record reflects that Latham spent significant amounts of her time preparing and presenting cases on behalf of the Attorney General, in addition to, via briefs and other internal memoranda, advising the Attorney General (and other subordinate state attorneys acting for the Attorney General) on confidential and important legal matters regarding the prosecution of cases filed for the protection of Ohio consumers. Since the elected Attorney General is herself undoubtedly a policymaking employee, *see, e.g., Shahar v. Bowers*, 114 F.3d 1097, 1103-04 (11th Cir. 1997), Latham's position as a confidential internal adviser and delegatee falls within the *Elrod* and *Branti* test.

Latham argues that this would mean that every government attorney is a policymaking attorney. But it is doubtless true that a wide array of government attorneys are policymaking employees. *See, e.g., Aucoin v. Haney*, 306 F.3d 268 (5th Cir. 2002) (assistant district attorney); *Biggs v. Best, Best & Krieger*, 189 F.3d 989 (9th Cir. 1999) (private associate attorney working under partner contracted by deputy city attorney); *Vona v. County of Niagara*, 119 F.3d 201 (2d Cir. 1997) (assistant attorneys to county social services department); *Williams*, 909 F.2d at 155 (chief city attorney; also compiling many such cases); *Bauer v. Bosley*, 802 F.2d 1058 (8th Cir. 1986) (staff legal assistant in office of clerk of

county court); *Ness v. Marshall*, 660 F.2d 517 (3d Cir. 1981) (city solicitor and assistant city solicitors).

The Seventh Circuit's opinion in *Americanos v. Carter*, 74 F.3d 138, 141 (7th Cir. 1996), is particularly instructive. In that case, the court found that an Indiana deputy attorney general ("DAG"; an analogous position in Indiana to Ohio's Assistant Attorney General position) was a policymaking employee and could be terminated merely for his political affiliations. The attorney attempted to argue that he personally had not exercised significant policymaking authority, but the court held that this did not matter:

> Although Americanos asserts that he was required to refer all issues and questions involving politics and/[or] policy making to Chief Counsel, and let that person make the ultimate decision on how to implement the AG's goals, it is likely that in making such referrals Americanos was asked to advise his superiors concerning what his research into these issues revealed, and what he thought would be the correct course of legal action. The plaintiff's mere participation in these types of discussions establishes that he had meaningful input into deciding how to handle legal issues for the state.

Id. at 142 (citations and quotations omitted). Noting that a DAG could be fired at any time by the Attorney General, that a DAG often appeared in proceedings representing the Attorney General, and that a DAG had statutory authority to be delegated *any* power of the attorney general, regardless of that DAG's specific assignment at any given time, the Seventh Circuit upheld his termination solely on political affiliation grounds. Other courts have likewise held that lower-level attorneys who still have significant responsibility are

policymaking employees. *See, e.g., Bauer v. Bosley*, 802 F.2d 1058 (8th Cir. 1986) (staff legal assistant in office of clerk of county court); *Livas v. Petka*, 711 F.2d 798 (7th Cir. 1983) (assistant state prosecutor); *Mummau v. Ranck*, 531 F. Supp. 402 (E.D.Pa. 1982), *aff'd per curiam*, 687 F.2d 9 (3d Cir. 1982) (assistant district attorney).

Latham's case is not significantly different from that of Americanos. Latham appeared in court on behalf of the Attorney General, drafted policy memoranda and prepared briefs for the Attorney General, and had to clear all of her work with a more senior state attorney, just as Americanos did. Latham's job description explains that she could exercise any duty of the Attorney General that the Attorney General opted to delegate to her, just as Americanos could. And even though Latham had to clear many of her actions with her superiors, she was as responsible as Americanos was in assisting in the formulation of state policies via recommendations made pursuant to individual cases or broader policy discussions.

We do not mean to say that every state employee who advises or serves under a policymaking individual is herself a policymaker. But where, as here, the employee exercises significant authority on behalf of a policymaker (even with close supervision), where the employee is responsible for making important policy implementation recommendations to a policymaker, and where the inherent duties of the employee are broad and limited primarily by the discretion of the policymaker, it is likely that the employee is herself a confidential or policymaking employee under *Elrod*.

Because Latham is a policymaking employee, our holding in *Rose*, that policymaking employees may be terminated for their speech and/or political affiliations without offending

their First Amendment rights under *Elrod* and *Branti*, applies. Latham also argues that *Rose* was incorrectly decided. But only our Circuit *en banc* or the Supreme Court may overrule a decision of a panel of this Court. *See, e.g., Beck v. Haik*, 377 F.3d 624, 635 (6th Cir. 2004). Therefore, even had Latham been terminated solely on the basis of the 1995 letter expressing her view of then-current OAG policies, her First Amendment rights were not violated, and summary judgment on this claim was appropriate.

C. Sovereign Immunity and the ADEA

Under the Eleventh Amendment, a State may not be sued in federal court unless it has consented to such a suit or its immunity has been properly abrogated by Congress. *See, e.g., Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996). Here, the state has explicitly stated that it has not consented to Latham's suit. Noting this, the district court granted summary judgment for defendants on Latham's ADEA claim on the ground that the Supreme Court, in *Kimel v. Florida Board of Regents*, 528 U.S. 62, 91, 145 L. Ed. 2d 522, 120 S. Ct. 631 (2000), held that Congress, when enacting the ADEA, did not abrogate States' sovereign immunity.

Latham contends that Kimel does not apply to her claim for retaliation under the ADEA, because, prior to *Kimel*, this Circuit had held that the ADEA did properly abrogate states' sovereign immunity claims. *See, e.g., Coger v. Bd. of Regents*, 154 F.3d 296 (6th Cir. 1998), *abrogated by Kimel*, 528 U.S. at 91. She argues, therefore, that a state actor should still be responsible for its retaliatory response to her attempts to protect rights that were, pre-*Kimel* in this Circuit, presumptively protected. However, Latham cites no caselaw for this proposition, and in fact finds herself in exactly the

same position as were some of the plaintiffs in *Kimel*, who were themselves appealing dismissal of their retaliation claims under the prior regime. *See Kimel*, 528 U.S. at 69. *Kimel* held squarely that all such claims were precluded by the Eleventh Amendment, and Latham's case is no different.

Further, Latham argues that, because classifications based on *speech* are inherently suspect, "the anti-retaliation provisions of federal statutes [including the ADEA] do effectively abrogate state immunity" for claims grounded in the First Amendment. Final Br. of Appellant at 46. Thus, she claims, her speech-grounded ADEA arguments can be brought against the OAG. But this confuses two very different legal regimes. Latham is, of course, free to pursue claims against the OAG based on actual speech-based discrimination under the guarantees of the First, Fifth, and/or Fourteenth Amendments indeed she has done so in her claim discussed *supra*. But claims under the ADEA must allege that a plaintiff was discriminated against on the basis of *age*, not speech, regardless of the conduct at issue. *See, e.g., Kimel*, 528 U.S. at 67 (citing text of statute). In *Kimel*, the Court clearly stated that "age is not a suspect classification under the Equal Protection Clause." *Id.* at 83. The Court also noted that the ADEA goes beyond the anti-discrimination mandate of the Constitution and would therefore require an abrogation of sovereign immunity independent from that inherent in the Equal Protection Clause. *Id.* at 82-91. It is true that state immunity may properly be abrogated by Congress in certain constitutional areas, *see, e.g., Hutto v. Finney*, 437 U.S. 678, 57 L. Ed. 2d 522, 98 S. Ct. 2565 (1978); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 49 L. Ed. 2d 614, 96 S. Ct. 2666 (1976), but such abrogations must be clearly expressed by Congress. *See, e.g., Quern v. Jordan*, 440 U.S. 332, 59 L. Ed. 2d 358, 99 S. Ct. 1139 (1979). The *Kimel* Court found no such abrogation in the ADEA. 528 U.S. at 82-91. As a

result, Latham's attempt to mix an ADEA age-based claim with claims of speech-based discrimination in order to avoid the sovereign immunity bar of the Eleventh Amendment cannot succeed. Latham simply cannot sue a State under the ADEA without the State's consent.

III.

For the preceding reasons, the district court's grant of summary judgment in favor of the OAG is AFFIRMED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

Case No. C-1-99-032

[Filed, May 13, 2003]

Mary Patrick Latham	)
Plaintiff	)
	)
v.	)
	)
Office of the Attorney	)
General *et al.*	)
	)

ORDER GRANTING DEFENDANT'S SECOND MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on Defendants' Second Motion for Summary Judgment as a Matter of Law. (Doe. #44.) For the reasons set forth below, the Court GRANTS Defendants' motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

The undisputed facts are laid out in the Court's Order granting in part and denying in part Defendant's first motion

for summary judgment. (Doe. #36.) A summary of those facts follows:

The Office of the Attorney General ("OAG") for the state of Ohio hired Plaintiff Mary Patrick Latham on April 13, 1987 to be the lone attorney from the Consumer Protection Section of the OAG in its Cincinnati Regional Office. In January 1995, Defendant Betty Montgomery was sworn in as Attorney General for the State of Ohio. After assuming office, General Montgomery appointed Defendant William Klatt as First Assistant Attorney General. In August 1995, Mr. Klatt hired Defendant Helen MacMurray to head the Consumer Protection Section.

On July 17, 1995, shortly after the OAG settled a lawsuit against a pest control company, Plaintiff drafted a letter to Attorney General Montgomery outlining a number of grievances with both the settlement and the direction that the Consumer Protection Section had taken since Attorney General Montgomery took office. She sent the letter on July 18 and forwarded copies to Mr. Klatt, Defendant Randal Berning, and Eric Brown, the acting head of the Consumer Protection Section.[2] The OAG terminated Plaintiff's employment on January 2, 1998, nearly two-and-a-half years later.

Plaintiff filed her most recent complaint in this action on February 26, 2001, alleging claims of retaliation in violation of the Age Discrimination in Employment Act ("ADEA") and the First Amendment. (Doe. #32.) Defendants moved for summary judgrnent (doe. #22), which the Court granted as to Plaintiff's ADEA retaliation claim and denied as to her First

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[2] Mr. Brown is not a defendant in this action.

Amendment retaliation claim (doe. #36). Specifically, the Court ruled that questions of fact remained on two issues: 1) whether Plaintiff's letter was sufficiently disruptive to tip the scales in favor of the government in the balancing test set forth in *Pickering v. Board of Education*, 391 U.S. 563 (1968), such that the letter was not protected speech under the First Amendment; and 2) whether Plaintiff's letter was a motivating factor in Defendants' decision to fire her.

II. ANALYSIS

Defendants now move for summary judgment on Plaintiff's remaining claim, citing *Rose v. Stephens,* 291 F.3d 917 (6th Cir. 2002), which the Sixth Circuit issued subsequent to the Court's partial denial of Defendants' first motion for summary judgment. In *Rose*, the Sixth Circuit reconciled two lines of Supreme Court cases: (1) *Pickering* and its progeny, which set forth a balancing test to be used to determine whether an employee's statement on a matter of public concern is protected by the First Amendment; and (2) *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel.*, 445 U.S. 507 (1980), which address the constitutionality of political patronage dismissals. 291 F.3d at 920-22.

Under *Pickering* and subsequent cases, a court addressing the termination of a government employee because of his speech must "seek" a balance between the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Connick v. Myers*, 461 U.S. 138, 142 (1983) (quoting *Pickering*, 391 U.S. at 568). If the balance favors the employee, then her statements are protected by the First Amendment; conversely, if the balance favors the State, the statements are not protected. *See id.* at

154. On the other hand, the Supreme Court teaches in *Elrod* and *Brand* that while the dismissal of a public employee based on her political affiliation normally violates the First Amendment, her termination for that reason is permissible if the public employee held a policymaking or confidential position. Elrod, 427 U.S. at 367; *see also Branti*, 445 U.S. 517-18 (elucidating what positions may be considered "policymaking" or "confidential").

Prior to *Rose*, the Sixth Circuit had not explicitly addressed the interplay of the Picketing and *Elrod/Branti* lines of cases in situations where both might apply. Specifically, the two lines of cases raise "the question of whether the *Elrod/Branti* exception applie[s] to the situation where a policymaking or confidential employee is discharged on the basis of actual speech rather than political affiliation." *Rose*, 291 F.2d at 921. In Rose, the court answered that question in the affirmative, holding that "where a confidential or policymaking public employee is discharged on the basis of speech related to his political or policy views, the Pickering balance favors the government as a matter of law." *Id.* In other words, terminating a confidential or policymaking employee on the basis of that employee's speech related to her political or policy views does not violate the First Amendment.

Applying that rule here, Defendants did not violate the First Amendment, and summary judgment is appropriate, if (l) Plaintiff held a confidential or policymaking position and (2) her letter related to her political or policy views.[3] As to

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[3] In their reply, Defendants indicate somewhat obliquely that they are also moving on the basis of qualified immunity for dismissal of Plaintiff's claims against them in their individual capacities. The

the second requirement, Plaintiff's letter clearly related to her views on OAG policy, and Plaintiff does not argue otherwise. Thus, only one question remains: did Plaintiff hold a confidential or policymaking position? In answering that question, "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518; see also *Rose*, 291 F.3d at 924.

The Sixth Circuit has outlined four general categories of positions that satisfy the standard set forth in *Branti*:

> **Category One**: positions specifically named in relevant federal, state, county, or municipal law to which discretionary authority with respect to the enforcement of that law or the carrying out of some other policy of political concern is granted;
>
> **Category Two**: positions to which a significant portion of the total discretionary authority available to category one position-holders has been delegated; or positions not named in law, possessing by virtue of the jurisdiction's pattern or practice the same quantum or type of discretionary authority commonly held by category one positions in other jurisdictions;

Court need not address the merits of Defendants' qualified immunity argument because *Rose* requires that Plaintiff's remaining claim be dismissed against all Defendants.

> **Category Three**: confidential advisors who spend a significant portion of their time on the job advising category one or category two position-holders on how to exercise their statutory or delegated policymaking authority, or other confidential employees who control the lines of communications to category one positions, category two positions or confidential advisors;
>
> **Category Four**: positions that are part of a group of positions filled by balancing out political party representation, or that are filled by balancing out selections made by different governmental agents or bodies.

McCloud v. Testa, 97 F.3d 1536, 1557 (6th Cir. 1996) (footnotes omitted). "Any ambiguity about whether a particular position falls into any of the[se categories] (and so also within the *Branti* exception),... is to be construed in favor of the governmental defendants when the position at issue is unclassified or non-merit under state law." *Id.* Plaintiff's position as assistant attorney general is unclassified under Ohio law. See O.R.C. § 124.11 (A)(11); *Huber v. Celebrezze*, 471 N.E.2d 181, 183 (Ohio Ct. App. 1984).

Unquestionably, the attorney general is a Category One policymaker under Ohio law. *See* Ohio Rev. Code § 109.02 (outlining the duties delegated to the attorney general). Ohio law authorizes the attorney general to appoint assistant attorneys general who "shall perform such duties... as are assigned [them] by the attorney general." Ohio Rev. Code § 109.03. The position description contained in Plaintiff's personnel file sets forth the duties that attorney general has assigned to the assistant attorneys general in the Consumer Protection Section. (See doc. #52 exh. A.) These duties include:

> Assigns secretarial and technical personnel to prepare case files or documents, or to collect evidence and data for case work. ([E].g., may use investigators when available or other personnel to prepare case for court or presentation to grand jury.) Appears before public tribunals for client at the specific direction of the Attorney General and with co-counsel (e.g., as authorized agent of the Attorney General and as client's attorney, may appear in civil or criminal trials, in state or federal courts, or before administrative hearing boards or commissions.) Researches, analyzes, and interprets complex issues of law; participates with other attorneys in developing legal policy with client; writes technical legal pleadings subject to review...; verbally presents legal opinions to technical or official personnel.
>
> Discusses law and policy on behalf of the Attorney General with senior attorney and client; applies such law and policy to create technical, confidential legal strategies with client; renders legal advice to client; appears in public and private settings to discuss such law and policy .... Works with federal, state, and local employees or group representatives to help solve problems eonceming the state, and to assist in negotiating solutions on behalf of or with client.
>
> ... Enforces state laws and regulations.

(*Id.*)

These inherent discretionary duties, particularly those involving the development of legal policy, the creation of confidential legal strategies, and appearing in court on behalf of the attorney general, place the position of assistant attorney

general into either Category Two, as a delegatee of the attorney general's discretionary authority, or Category Three, as a confidential advisor to the attorney general. *See Williams v. City of River Rouge*, 909 F.2d 151, 154 (since city attorney's role was not "largely ministerial," city attorney fell within *Branti* exception). Either way, assistant attorneys general such as Plaintiff satisfy the *Branti* standard and may be dismissed for their speech on issues related to policy or politics. Federal appeals courts that have addressed the applicability of the *Branti* exception to government attorneys, including the Sixth Circuit, have agreed.[4] *See, e.g., Williams*, 909 F.2d at 151 (city attorney); *Aucoin v. Haney*, 306 F.3d 268 (5th Cir. 2002) (assistant district attorney); *Butler v. New York State Dep't of Law*, 211 F.3d 739 (2d Cir. 2000) (deputy bureau chief for state law department); *Biggs v. Best, Best & Krieger*, 189 F.3d 989 (9th Cir. 1999)(private attorney for firm that performed services of city attorney); *Mummau v. Ranck*, 687 F.2d 9 (3d Cir. 1982) (assistant district attorney) (per curiam); *Newcomb v. Brennan*, 558 F.2dS 825(7th Cir. 1977) (deputy city attorney).

Plaintiff contends that this analysis is erroneous because it fails to take into account the duties that Plaintif fin fact undertook as an assistant attorney general. However, the *Branti* standard is met so long as either the inherent duties of a position or the specific duties performed by the employee in question indicate that political affiliation is an appropriate requirement for the position. *Faughender v. City of North Olmstead*, 927 F.2d 909, 913 (6th Cir. 1991). As explained above, the inherent duties of an assistant attorney general

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[4] The only exception to this rule is public defenders, who do not satisfy *Branti* because their primary responsibility is to individual defendants, not the government. *See Branti*, 445 U.S. at 519.

satisfy the *Branti* standard. Therefore, the Court need not consider Plaintiff's specific duties.

Finally, Plaintiff argues that Rose does not control in this case because Plaintiff's criticisms of General Montgomery's policies were never publicized. Specifically, Plaintiff notes that in *Rose* the Sixth Circuit quoted *Pickering* to say that "'certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship.'" 291 F.3d at 922-23 (quoting *Pickering*, 391 U.S. at 570 n.3). Plaintiff places undue importance on the word "public" in that quotation, as the facts in *Rose* demonstrate. In *Rose*, the plaintiff was terminated because he refused to withdraw a memorandum that he had submitted to the Secretary of Kentucky's Justice Cabinet and the governor of Kentucky. The memorandum was never made public. Nevertheless, the Sixth Circuit found that the plaintiff's termination was justified as a matter of law because the plaintiff was a policymaking official under *Branti*. Evidently, then, there is no requirement that a disloyal statement be public for it to justify the termination of a policymaking employee. This makes sense, as the effective performance of public services could be undermined just as much by a policymaldng or confidential employee who is privately disloyal as by one who publicizes her discontent.

III. CONCLUSION

Subsequent to the Court's disposition of Defendants" first motion for summary judgment, the Sixth Circuit handed down Rose, which extended the *Elrod/Branti* exception to dismissals based on a government employee's speech on policy or political issues. Because the Court finds that Plaintiff's position as an assistant attorney general falls within that exception, Defendants' decision to terminate Plaintiff for her

speech did not violate the First Amendment as a matter of law. Defendants' Second Motion for Summary Judgment as a Matter of Law is therefore GRANTED. (Doe. #44.

IT IS SO ORDERED.

/s/ Susan J. Dlott
Susan J. Dlott
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-99-032

[Filed, May 13, 2003]

Mary Patrick Latham	)
Plaintiff	)
	)
v.	)
	)
Office of the Attorney	)
General *et al.*	)
	)

JUDGMENT IN A CIVIL CASE

Decision by Court: This action came to trial or hearing before the Court: The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that

... Plaintiff may not maintain a retaliation claim under the ADEA against Defendants, and the Court GRANTS Defendants' First Motion for Summary Judgment with respect to Count I. (Doe. 36)

... Defendants' Second Motion for Summary Judgment as a Matter of Law is therefore GRANTED. (Doe. 54)

5/13/03 Kenneth Murphy, Clerk

APPENDIX D

July 18, 1995

Attorney general Betty D. Montgomery
State Office Tower- 17th Floor
30 East Broad Street
Columbus, Ohio 452113-3428

Dear Betty:

My name is Mary Patrick Latham and I am the attorney who works in your Cincinnati office for the Consumer Protection Section.

Four months ago, during your first visit to the Cincinnati office, I mentioned to you that I was working on a big case involving a Dayton company named Allied Pest Control. Yesterday was the first day of trial but it did not go forward because the parties reached a tentative settlement.

I was prepared to present a strong case on behalf of the State. Twenty-two witnesses had been lined up to testify and approximately 1400 exhibits had been labeled for submission to the court. Prior to the trial, the Court had been well educated about the case because I had filed three motions for partial summary judgment and the suppliers had filed two motions. One of the State's motions was successful.

My purpose in writing you is to discuss the terms of the settlement and the manner in which settlement was achieved. I believe an injustice to consumers has occurred and I was

powerless to avert it. You also need to be informed about the history of the case.

The main ingredient of the settlement proposal is that Allied Pest Control will provide its current customers a "damage repair" guarantee. Under the terms of its current contract, the company guarantees its work by limiting its liability to "retreatment only." the contract specifically excludes liability for structural damage.

Seven years ago in a lawsuit our office had with this same company, we were successful in having the guarantee declared illusory and a violation 1345.03(A) of the Consumer Sales Practices Act. This declaration was subsequently affirmed on appeal. See State ex rel. Celebrezze v. Ferraro (1989), 63 Ohio App.3d 168.

Our office failed to follow up on the success of the declaratory action or to monitor Allied's compliance with the Consent Judgment which was also a part of the 1988 case. Mike Harmon was lead counsel and I was new to the office; neither one of us suggested monitoring nor were we directed to do so by the section chief.

In November, 1993, I discovered the Allied Pest Control had never changed the language of its guarantee nor undertaken many of the corrective measures ordered by the Court in the 1988 agreement. Mike knew about Allied's continued practice of not examining the interior of consumers' homes when consumers paid a[n] annual fee for an inspection. When he finally got worn out with negotiating with Allied on this point, the two of us sought authorization to file a contempt action in 1992. Authorization was denied, either by section chief Mark D'Allessandro or the executive staff.

The present lawsuit was initiated by Allied Pest Control in February, 1994 as a declaratory action. The issue was the nature of the restitution Allied was required to pay to complainants who sought a director's hearing with the Department of Agriculture. In 1988, Allied entered into an agreement with ODA; the hearing mechanism was part of ODA's agreement and our Consent Judgment. The Allied case had been reassigned to me in August, 1993 for the purpose of assisting some consumers at a director's hearing. Allied obtained two continuances of the hearing before instituting the current action.

In responding to the lawsuit, our office counterclaimed. We also filed a contempt action before the judge who was in charge of the 1988 case. The State's contempt motion was overruled and our office immediately initiated settlement talks. Virtually all issues were resolved during these talks and a heavy-duty monitoring system put in place. However, the parties could not come to terms over the "retreatment only" limitation in Allied's contract.

When the State filed its motion for partial summary judgment on this issue in late November, Allied's attorney terminated negotiations because, he said, the State had requested such punitive relief. The State did in fact ask for rescission on behalf of all the consumers who had entered contracts with Allied since the onset of our two year statute of limitations period.

On the surface, Allied's upgraded "damage repair" guarantee looks to be a happy solution. Were the company a more responsible one, this would be true. However, Allied invariably fights tooth and nail over every damage claim, always asserting that the damage is "old," never new damage arising from its inadequate treatment. It took months of

negotiation in 1988 to resolve the claims of the 28 consumers involved in that case.

In addition, Allied's owner, Mike Ferraro, has attempted to sell the company during the part year. So there should be considerable concern about just how long the damage repair guarantee will be in place. The only protection we bargained for was to have a judgment lien in the amount of $50,000 placed on one of Mr. Ferraro's real estate holdings. The lien will be good for three years.

Then, there's the inspection problem. Under the terms of the settlement, Allied will inspect the interiors of those homes where this has not occurred and, if new infestation is found, will retreat the premises and pay for any new damage. An ODA inspector will make the determination of what damage is new and what damage is old. Again, this appears to be a happy solution but for the fact that the inspectors are Allied's personnel. It is therefore unlikely that any inadequate treatment will be discovered or any new damage found.

The heart of the problem with Allied is how its pesticide treatments are performed in the first place. Had the trial gone forward, the State would have provided testimony from an ODA inspector about a 1993 survey he performed regarding Allied's treatments. In at least three out of the seven homes he examined, he determined that Allied used only 70% of the amount of termiticide recommended by the manufacturer. Two of the homes Allied has retreated. But, just five days before the trial, investigator Clements and I went to one of them in order to discuss the homeowner's testimony regarding an aspect of the case unrelated to the adequacy of the original treatment. While the homeowner was showing us the damage termites had caused his floor, he broke up one of the damage

areas, whereupon the three of us found ourselves looking at live termites.

Again, the settlement has arranged for a mechanism that will presumably address this problem but the mechanism depends on the good faith of Allied Pest Control to perform in the intended manner. Because our office has sued Allied three times in the past 18 years the ODA has tangled with the company several times, such performance is an unrealistic prospect.

Why did I sit there like a dummy and do nothing? I did so because section chief Eric Brown told me Friday, week ago, after Allied made its first settlement offer, that my expectations for consumer relief were unreasonable and no court would give me the restitution I wanted. Co-counsel Bob Hart was put in charge of negotiating a compromise and it was he who ran the show with respect to settlement.

You now know more facts about the case than Eric Brown does. Bob Hart was not fully informed either because his role was to handle the expert testimony. There are so many facts that will never come to light because once again the State of Ohio has opted to save a business rather than to protect consumers. A court will never hear Cindy Macazek describe how Allied retreated her house three times last year but live termites were found two months ago when she had it treated by another company. A court will never hear that an Allied supervisor put in a 1991 inspection report that he inspected the crawl space of Mrs. Spicer's home, that the next two years Allied's inspector did not inspect the crawl space when he stopped by (rather than make an appointment) to inspect and found no one at home, and that, in 1994, an inspector from another pest control company found the joists which support the entire base of her home so eaten up with powder

post beetles he reported it to the ODA. A court will never hear that the homeowner with whom I met last week had invited an Allied representative to his home eight months ago to discuss the increasing damage to his floor and was told that this was caused by the drying out effect of the termiticide and he needn't be concerned about live infestation.

The section chief is in charge and had the right to direct the attorney handling a case and to provide guidance for settlement negotiations. But those rights are not fairly asserted when they are initiated in the final days of trial preparation and are based on only a bare-bones knowledge of the case. I am not trying to cost Eric Brown his job. He merely followed the footsteps of his predecessors. This is one of the problems this letter is intended to address.

The more significant problem is that the Consumer Protection Section is a "no guts" law enforcement agency. Cases are filed with greater emphasis on modifying the supplier's behavior than reimbursing consumers. Class actions, the type of action specifically endorsed by the Consumer Sales Practices Act, are never filed as a matter of policy. The "big picture" aspect of a case is never developed. If an Allied salesman came to your door offering to treat your home for termites, he would hand you a brochure that says Dursban TC is 100% effective for 20 years. But the pest control industry (and ODA too) knows the Dursban TC is not nearly as long lasting as the pesticides from two decades ago due to EPA regulations. So why wasn't the Allied case looked upon as an opportunity to change an entire industry for the better? Every pest control company in Ohio should be told to dump their "retreament only" guarantees. Per the 1988 declaration, they're illegal. Every pest control company should be required to disclose to consumers the life span of a termiticide treatment. A consumer case should not be a "one

supplier: case. It should be an example to all the suppliers in theat particular business. But if the Attorney General isn't going to obtain consumers their due and isn't going to take the supplier to task monetarily, then what's the point. Sure, a handful of consumers get some compensation, but the effort without the impact is wasted.

I believe someone needed to tell you how the section really operates. I apologize for the length of this letter but without the facts you will not be able to turn the situation around.

Sincerely yours,

Mary Patrick Latham
Assistant Attorney General
Consumer Protection Section

cc. Eric Brown, Acting Chief, Consumer Protection Section
Randall Berning, Managing Attorney, Cincinnati
Robert Hart, Assistant Attorney General, Consumer Protection

(2)

No. 05-2

In The Supreme Court Of The United States

MARY PATRICK LATHAM,

Petitioners,

v.

THE OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF OHIO, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

JIM PETRO
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DOUGLAS R. COLE*
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QUESTIONS PRESENTED

1. Under *Pickering v. Board of Education*, 391 U.S. 563, when a public employee claims that she was fired in retaliation for her speech, courts balance the employee's interest in free speech against the employer's interest in maintaining an efficient, non-disruptive workplace. If the speech is disruptive, the public employer is entitled to discipline or fire the employee.

Under *Branti v. Finkel*, 445 U.S. 507 (1980), when a public employee claims that she was fired for her partisan affiliation, courts examine her particular job to determine whether the job is one for which political affiliation is an "appropriate" consideration, i.e., whether the employer's need for loyalty trumps the employee's interest in freedom of association. Typically, when a public employee's position is a "confidential" or "policymaking" one, she is said to be "*Branti*-exempt," and may be fired solely for partisan reasons.

In light of the above rules, the first question presented is this:

When a court performs a *Pickering* balancing test, may it look to a public employee's *Branti*-exempt status and determine that the *Pickering* balance favors the government as a matter of law when the employee speaks out on political or policy-related issues?

2. Is a State assistant attorney general, who speaks for the Attorney General in court and assists the Attorney General in implementing public policy, a confidential or policymaking employee for purposes of *Branti* or *Pickering*?

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COUNTERSTATEMENT 5

A. Latham worked for the Ohio Attorney General as an Assistant Attorney General in the Consumer Protection Section 5

B. Latham became unhappy with the office's handling of a particular case and with the office's consumer-protection policy in general, and she complained about it. 6

C. Latham was fired and she sued, claiming that she was fired in retaliation for exercising her right to free speech. 9

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INTRODUCTION

This case, which involves a government employee's claim that she was fired in retaliation for exercising free speech rights, does not warrant review. At the end of the day, it involves the application of settled law to a particular set of facts. To be sure, the Petition does, at first blush, raise issues on which the appeals courts seem to diverge in approach, as those courts do recite varying formulae in resolving claims such as Petitioner Latham's. But, on close examination, the "split" that Latham alleges is illusory, with variations only at the margins—margins not at issue here. Indeed, Latham's case would come out the same in any of the circuits that she cites as evidence of a "split." Her real complaint is not about the rule of law, but about the legal characterization that the court below applied to her particular facts—namely, the finding that as an Assistant Attorney General, she was a policymaking and confidential employee. Despite her insistence otherwise, that essentially fact-based squabble does not merit review.

Latham's claim arises at the intersection of two related lines of cases involving the First Amendment rights of government employees, namely, the "free speech" or *Pickering* cases and the "free association/political party" or *Elrod/Branti* cases. Under the *Pickering* line of cases, the First Amendment generally protects a public employee from employer reprisal based on the employee's speech, where that speech touches on a matter of public concern. *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983). However, in determining whether the employee is protected, courts balance the employee's speech interest against the public employer's strong interests in maintaining an efficient, non-disruptive workplace and providing government service. If the speech's disruptive nature outweighs the speech's value, the public employer is entitled to discipline or fire the employee.

A second, related line of cases, known as the *Elrod-Branti*, or "political patronage," cases, governs whether a public employee may be fired based solely on her membership in a political party. *Elrod v. Burns*, 427 U.S. 347, 367 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980). Under *Elrod* and *Branti*, some employees are protected from being fired for their partisan affiliation, but for other employees, political affiliation is an "appropriate" consideration. When a public employee's position is a "confidential" or "policymaking" one, that employee may be fired solely for partisan reasons, because for such jobs, the employer's need for loyal and trustworthy employees trumps the employee's interest in freedom of association.

Here, Latham complains because the Sixth Circuit—improperly, in her view—cited the *Elrod/Branti* concept of a "confidential" or "policymaking" employee when it rejected her *Pickering* claim. That is, the Sixth Circuit here followed a rule, developed in an earlier Circuit case, that looks to an employee's status under *Elrod/Branti* in performing the *Pickering* balancing test. See *Rose v. Stephens*, 291 F.3d 917 (6th Cir. 2002). In *Rose*, the court held "where an employee is in a policymaking or confidential position and is terminated for speech related to his political or policy views, the *Pickering* balance favors the government as a matter of law." *Id.* at 922. The Sixth Circuit reasoned that "when an employee occupies a position for which political loyalty is a legitimate criterion, the nature of the position itself weights the balance in favor of the government [under *Pickering*]." *Id.* at 923. In the Circuit's view, it would make little sense to find that an employee is so high-ranking, or in such a confidential role, that even a silent employee could be summarily fired for mere party label, but the same employee, if she speaks out on political or policy differences, would then be entitled to protection. *Id.* at 922.

Latham attacks both the *Rose* approach and its application to her facts. That is, she argues that the rule

should not exist and has been wrongly adopted in some circuits, and she also argues that in any case, she is not truly the type of employee who triggers the *Elrod/Branti* exception. Neither issue warrants review.

First, the Sixth Circuit's reliance on Latham's *Elrod/Branti* status, in performing a *Pickering* balancing, is nothing novel or controversial. It flows naturally from the Court's cases in both related lines, and the circuit courts uniformly recognize this confluence of doctrine. Even though the two lines are given different taxonomic labels, as "free speech" or "free association" cases, both involve the same competing concerns of (1) an employee's First Amendment rights and (2) an employer's desire to have "team players" on the team. The Court has always acknowledged that an employee's status as a policy-making advisor, or a low-level functionary, plays a major role in the *Pickering* balance, so in one sense, the Sixth Circuit's *Rose* "rule" is nothing more than a common-sense observation that the same employees who are high-level enough to fall under the *Elrod/Branti* exception are also the type who will lose the *Pickering* balancing test. Some circuits have stated it more in the nature of a "rule" and others as more of an observation, but none disagree at the broadest levels. Indeed, almost all, if not all, potential cases would come out the same way in any or all circuits.

Most important here, Latham's case would come out the same in any circuit, as even without a bright-line rule, her status as an assistant attorney general would weigh heavily against her in the *Pickering* balance. For example, the Second Circuit says that "the policymaking status of the discharged or demoted employee is very significant in the *Pickering* balance, but not conclusive." *McEvoy v. Spencer*, 124 F.3d 92, 103 (2d Cir. 1997). Although that court stopped shy of a per ser rule, it stressed that a policymaking employee's status would be conclusive in "most cases,"

leaving such a plaintiff's victory an "unlikely" event in that Circuit.

Second, and related, is that Latham's real complaint is that both courts below found her to be a *Branti*-exempt-level employee, when she insists that her duties were really rather low-level—and that separate question does not merit review. Latham's attempt to downplay her role is mistaken, but more important, her effort shows that her case is really a factbound one. That is so because, unless Latham persuades the Court to revisit the issue of *her* particular status, along with addressing the *Rose* rule, her attack on *Rose* is irrelevant. If the *Rose* approach is right, she automatically loses because of her status. But if the Sixth Circuit is wrong, and the government does not "always win" the *Pickering* balancing test in some automatic sense, Latham's claim would still fail, based on the lower courts' determination regarding her status. The same factors that drove the courts to put her on the "high-level" side of the "automatic line" would surely still carry great weight against her in a "pure" *Pickering* approach, "untainted" by the *Elrod*-inspired categorical approach. So an abstract legal victory on her main question presented would get her nowhere unless, again, she could not only get a new rule of law, but could also get this Court (or another on remand) to address the other "issue," which is really a matter of delving into the facts and rating her position differently.

Finally, the Court's pending review of *Garcetti v. Cabellos*, No. 04-473, is no reason to grant review here. Resolution of the question there, which asks when an employee's speech is a matter of public concern, cannot help Latham, as she lost on other grounds. Indeed, at most, *Garcetti* could offer yet another ground on which Latham should lose. So the Court need not wait for *Garcetti* to deny review here.

COUNTERSTATEMENT

A. Latham worked for the Ohio Attorney General as an Assistant Attorney General in the Consumer Protection Section.

The Ohio Attorney General is an independently elected official and Ohio's chief law officer. Ohio Const., Art. III, §§ 1 & 2; Ohio Rev. Code §§ 109.01 & 109.02. In addition to performing a wide variety of civil and criminal regulatory, investigatory and supportive functions, the Ohio Attorney General provides legal advice and representation to State agencies, universities and officials. Ohio Rev. Code §§ 109.02, 109.12 & 109.361.

Ohio Rev. Code § 109.03 authorizes the Ohio Attorney General to appoint Assistant Attorneys General, who "each shall perform such duties, not otherwise provided by law, as are assigned him by the attorney general." Assistant Attorneys General are specifically designated as "unclassified" employees by Ohio Rev. Code § 124.11(A)(11), meaning that they are not covered by Ohio's civil-service protections, but are instead at-will employees.

Ohio's Consumer Sales Practices Act authorizes the Ohio Attorney General to investigate alleged violations and to bring a variety of civil and criminal actions to enforce its provisions, including actions to recover money for the benefit of consumers. Ohio Rev. Code § 1345.05 through 1345.07. Mary Patrick Latham was an Assistant Attorney General appointed pursuant to Ohio Rev. Code § 109.03, assigned to the Consumer Protection Section, and entrusted with the task of enforcing the Consumer Sales Practices Act, under the supervision of her managers.

Latham's position description stated that she was to prepare cases and appear in court on behalf of the Attorney General, present legal opinions or resolve legal issues for the Attorney General or other Ohio agencies or officials, and

draft or review various legal documents. It cautioned that Latham "must be able to maintain the highest level of confidential and fiduciary relationship in counseling clients and the Attorney General." Although she was required to obtain supervisory approval for major decisions, Latham's duties were little different from any other line-level quasi-prosecutorial government attorney. That included preparing legal documents that would be filed with the Attorney General's name on them, of course, as well as appearing in court speaking for the Attorney General.

B. Latham became unhappy with the office's handling of a particular case and with the office's consumer-protection policy in general, and she complained about it.

Latham was assigned as co-counsel in litigation against a pest-control company called Allied Pest Control. This case was a followup to a case she had worked on years before, involving the same company. Both cases involved the pest control company's attempt to contractually limit the remedy that consumers could seek if pests returned after treatment. Allied limited its contractual liability to consumers for defective treatments to "re-treatment only," meaning that the company would treat the property again, as opposed to being liable for property damage caused by termites, and the like.

For the second Allied Pest case, Latham had prepared for an elaborate trial that was to include some twenty-two witnesses and 1,400 exhibits. On the eve of trial, Latham's co-counsel was directed to negotiate a settlement. Under that settlement, Allied agreed to be responsible for post-treatment damage. It further agreed to a regime of inspections by the Ohio Department of Agriculture to determine whether any homes suffered post-treatment infestations or damage.

Latham was disappointed to learn that her case was settled, and that she would not get to go to trial, and she vented her frustration in a letter that she directed to the

Attorney General and copied to other supervisors and co-counsel. Latham sent her letter, dated July 18, 1995, to Attorney General Betty D. Montgomery, who had taken office in January 1995. Latham also copied her immediate and next-level supervisors, and copied her co-counsel colleague as well. See Pet. App. at 31a (Item D) (full letter).

Latham's letter railed against the settlement in particular, and against the office's consumer-protection practices in general. She contended that the settlement was an "injustice to consumers" because, she said, Allied was an irresponsible company that had not lived up to past settlements, and Allied might be sold or become insolvent in the future. Moreover, Latham argued, much of Allied's past work was substandard, inspectors were unlikely to discover new damage, and Allied was likely to fight each individual claim of new damage "tooth and nail." Although it was unclear from her letter just how Allied's customers would have been better protected by a judgment than by the settlement agreement, Latham lamented that "a court will never hear" evidence Latham had prepared regarding Allied's shoddy work and failure to make repairs. These facts would "never come to light" because the State had "opted to save a business rather than to protect consumers." *Id.* at 35a. Latham concluded with her broader attack on her bosses' approach to consumer protection:

> The more significant problem is that the Consumer Protection Section is a "no guts" law enforcement agency. Cases are filed with greater emphasis on modifying the supplier's behavior than reimbursing consumers. Class actions . . . are never filed as a matter of policy.

Id. at 36a. Latham concluded that the Allied case should have used as a starting point for a broader effort to reform the pest control industry. *Id.* at 36a–37a (urging that "[e]very pest control company in Ohio" should be challenged to change

practices and that Allied should be made "an example to all the suppliers in that particular business.").

Notably, while Latham disagreed strongly with the office's approach, and went as far as calling it a "no guts" agency, she accused no one in her office of illegal or unethical conduct. She disagreed with the office's discretionary decision to settle the Allied Pest Control case, on which she had worked very hard in preparing for trial. That is, although her complaint had a strident tone, its substance—regarding the advisability of trial versus settlement in a case—is the type of communication that is routine between a government staff lawyer and her superiors. Similarly, her view on whether the office, as a quasi-prosecutorial one, should focus more on deterring violators or on compensating victims is precisely the kind of debate that is replayed daily in prosecutorial and quasi-prosecutorial agencies across the country.

Latham followed up her letter with frequent informal complaints, to her bosses and colleagues alike, about the office's approach to consumer protection issues. Two years later, Latham's new supervisor raised concerns about Latham's job performance and difficult relationships with other staff. Latham countered by maintaining that she was not promoted or more intimately involved in major cases because of her age. Soon another staff member complained about Latham's conduct, and several supervisors and colleagues explained how her entire pattern of behavior was disruptive over a long time. Attorney General Montgomery agreed with their concerns about her ongoing lack of cooperation. Although the more recent disruption, and not the years-old letter, was her concern, she agreed that the letter was representative of the later problems. The letter, with its broad "no guts" accusation, "sort of reflected the whole frustration I had with Mary Pat." Montgomery Dep. at 66. That is, it reflected Latham's insistence on presenting her

policy preferences stridently, and her unwillingness to accept her supervisors' differing policy judgments.

C. Latham was fired and she sued, claiming that she was fired in retaliation for exercising her right to free speech.

Latham was discharged on January 2, 1998. She then sued, in the United States District Court, Southern District of Ohio, naming as defendants the Attorney General's Office, the Attorney General personally, and three other supervisors. She originally sued under an age discrimination theory, and then added a claim under 42 U.S.C. § 1983, alleging among other things that her termination occurred in retaliation for her "no guts" letter, in violation of her rights under the First Amendment.[1] The defendants maintained that Latham's individual opinion regarding whether a particular case should be settled, tried, or expanded was speech "as an employee" that did not address any matter of public concern as required by *Connick v. Myers*, 461 U.S. 138 (1983). Moreover, Latham's "no guts" allegations tended to disrupt "the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning," or implicated the maintenance of "discipline by immediate superiors," and therefore was unprotected employee speech under the balancing test of *Pickering v. Board of Education*, 391 U.S. 563, 570 (1968). Nonetheless, the district court denied summary judgment.

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[1] While Latham's age discrimination suit ran against the Office itself, her Section 1983 claim was aimed at the four named individuals: then-Attorney General Betty D. Montgomery; William A. Klatt, then-First Assistant Attorney General; Helen MacMurray, then-Chief of the Consumer Protection Section; and Randall Berning, managing attorney of the Cincinnati Office. The 1983 suit cannot be maintained against the State, of course, see *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 66 (1989), and the Attorney General's Office is an arm of the State. Thus, although the Petition names the Office as a Respondent, only the individuals are Defendants-Respondents now.

D. Both courts below rejected Latham's claim as a matter of law, finding that her role as an Assistant Attorney General was such that the government automatically won the *Pickering* balancing test when an AAG spoke on a policy matter.

A few weeks before Latham's § 1983 claim was scheduled for trial, the Sixth Circuit issued its opinion in *Rose v. Stephens*, 291 F.3d 917 (6th Cir. 2002). In *Rose*, the Sixth Circuit held that, in performing *Pickering's* balancing test and determining whether certain speech was disruptive, a court could also look to the Court's teachings in the political-affiliation cases. Under *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), *Elrod v. Burns*, 427 U.S. 347 (1976), and similar decisions, public employees may not be subjected to adverse employment actions because of their political affiliations or beliefs. But under *Branti v. Finkel*, 445 U.S. 507, 518 (1980), and its progeny, this rule does not protect employees who occupy positions for which political affiliation is an "appropriate" consideration.

In *Rose*, the Sixth Circuit adopted a rule that looked to an employee's "*Branti*-exempt" status in performing the *Pickering* balancing. The court noted that *Pickering* had considered an employee's status as an important part of the balance, and that "dismissal of an employee in a position which requires loyalty or confidentiality would implicate 'significantly different considerations' than those present in the discharge of a lower-level public employee." *Rose*, 291 F.3d at 922 (quoting *Pickering*, 391 U.S. at 570 n.3). The court noted that the government employer's interest in *Pickering* converged with the government interest in the *Branti* cases: "the government's interest in appointing politically loyal employees to certain positions [under *Branti*] converges with its interest in operating an efficient workplace [under *Pickering*] because loyalty by those employees is an essential requirement for the efficient functioning of the workplace." *Rose*, 291 F.3d at 923. Thus, the court held in

Rose that "where an employee is in a policymaking or confidential position and is terminated for speech related to his political or policy views, the *Pickering* balance favors the government as a matter of law." *Id.* at 922.

After *Rose* was decided, the district court allowed the defendants to file a supplemental motion for summary judgment, which was granted. Latham appealed, and the United States Court of Appeals for the Sixth Circuit affirmed. *Latham v. Office of the Attorney General*, 395 F.3d 261 (6th Cir. 2005), Pet. App. 3a. The Sixth Circuit agreed with the district court that Latham's speech addressed a "matter of public concern" under *Connick*. Pet. App. 7a. Nonetheless, her claim failed because her speech was disruptive as a matter of law under *Pickering* and *Rose*.

In *Latham*, the Sixth Circuit repeated its *Rose* reasoning, including what it saw as a practical reason to look at an employee's *Branti*-exempt status in performing the *Pickering* balancing:

> [I]t would seem incongruous for us to suggest that [Latham's] job-related speech would have to rise to the level of outright rebellion before termination would be valid under the First Amendment, when the same employee could be fired merely due to affiliation with an opposing political party, whether or not the employee ever evinces any policy disagreement with the party in power. In either case, a confidential or policymaking employee would have, under *Elrod*, *Branti*, and *Rose*, placed himself in a position such that his State employer might not be able to trust him to implement fully the employer's policies.

Id. at 10a–11a. Because *Rose* already set that standard, the main question was whether Latham's position was one involving confidentiality and policymaking, and thus whether

the job was one for which the government's interest in loyal employees was high. The court concluded that she did have such a position. *Id.* at 16a–17a. The court therefore upheld the grant of summary judgment against her. Latham's petition for rehearing and rehearing *en banc* was denied. *Id.* at 1a. This petition ensued.

REASONS FOR DENYING THE WRIT

The Petition should be denied for several reasons. First, the decision below is nothing exceptional. It flows naturally from the Court's precedents, as the Court has always looked to a speaker's role when performing a *Pickering* balancing. Most circuits follow an identical rule, and the minor deviation in precise formulation in the circuits is so marginal that it is not worthy of review. Second, Latham's real complaint seems to be her belief that the courts below should not have found her role as an Assistant Attorney General to be one involving confidentiality and policymaking—but that issue is factbound and not certworthy. Finally, the Court need not wait to resolve the pending case of *Garcetti v. Cabellos*, No. 04-473, to deny this Petition.

A. The decision below is not novel or exceptional, as it follows this Court's precedent and is consistent with the approach followed in most or all circuits.

1. The Court has always considered an employee's position to be a key factor in the *Pickering* balance, so the Sixth Circuit's approach flows naturally from that principle.

Latham claims that the Sixth Circuit's approach is "inconsistent with" the Court's *Pickering* cases, for, in her view, the Circuit improperly imported *Branti* principles into the *Pickering* context. But the Sixth Circuit's view is not at all inconsistent with *Pickering* and its progeny, which have always given heavy weight to a speaker's role when determining if speech is disruptive. To be sure, the Court has

never mandated a rule such as that adopted by the Sixth Circuit, but that rule is perfectly consistent with what the Court has done.

The *Pickering* Court stressed the importance of an employee's role, and his relationship with other employees, in determining whether his speech was protected. 391 U.S. at 569–70. The Court applied that principle in evaluating Mr. Pickering's job as a teacher. The Court explained that his speech criticized the school board, so he did not criticize anyone with whom he regularly worked. *Id.* at 569–70. Thus, his speech did not implicate questions of discipline by superiors, or harmony among co-workers. *Id.* at 570. Further, his employment relationship with the board and the superintendent were not "the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning." *Id.* Because the teacher did not have the type of employment relationship that called for such "personal loyalty," and because of the nature of the statements at issue, the Court held that the teacher's statements were protected.

Notably, the Court in *Pickering* did more than stress the importance of an employee's position and the nature of her employment relationships; it specifically commented that in some future cases, the employee's job alone could be determinative. The Court observed that "[i]t is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal." *Id.*, 391 U.S. at 570 n.3.[2] Further, the Court noted that, along with confidentiality, the nature of a personal relationship might be enough to tilt the balance against an

[2] There, the Court spoke in terms of "even completely correct public statements" because another issue in *Pickering* was whether the statements involved were true or false. The bottom line is that the Court allowed that, for some employees, any statement might warrant dismissal.

employee, regardless of the statement's content. The Court said that in some public positions, "the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them." *Id.*

Thus, *Pickering* established at the beginning that an employee's position in an office would be critical, and perhaps conclusive, and the Court elaborated on that importance in *Rankin v. McPherson*, 483 U.S. 378 (1987). In *Rankin*, a "clerical employee in a county Constable's office" was fired for remarking, after an attempted presidential assassination, that "If they go for him again, I hope they get him." *Id.* at 379–80. In holding that such a statement was protected free speech, and the firing unjustified, the Court relied almost solely on the employee's status as a clerical employee. The Court held that where "an employee serves no confidential, policymaking, or public contact role, the danger to the agency's successful functioning from that employee's private speech is minimal." *Id.* at 390–91.

Thus *Rankin*, which says that the State's interest is "minimal" when an employee "serves no confidential, policymaking, or public contact role," easily implies that the opposite statement also holds true. Where an employee does serve such a role, the state's interest is maximal.

Consequently, the Sixth Circuit's *Rose* rule, which says that the government automatically wins the *Pickering* balancing test when certain employees speak out on policy matters, is nothing more than a natural application of what the Court said in *Pickering* and *Rankin*. The Court had already previewed the *Rose* approach in *Pickering*, when it spoke of "positions in public employment" for which the need for confidentiality would be paramount. And the Court applied the same approach at the other end of the spectrum in *Rankin* in saying that the government's interest was minimal

regarding clerical employees' speech. At most, what *Rose* does is to crystallize the approach into a rule. But as explained below, that does not differ much, in the end, from giving great weight to an employee's status, as in *Pickering* and *Rankin*. Indeed, although the Sixth Circuit used the shorthand of *Branti* terminology, and referred to the interaction between the free-speech and free-association cases, the *Rose* rule could easily have been developed from *Pickering* and *Rankin* even if *Branti* and the political-affiliation cases did not exist.

Latham says that both *Pickering* and *Rankin* rejected bright-line rules, and that *Rose* adopts one, so that the latter conflicts with the former—but she is wrong. *Pickering* rejected a per-se rule only insofar as it rejected the idea that any *one* rule could govern *all* speech cases. That says nothing about whether rules or presumptions could be adopted to govern recurring subcategories of cases; e.g., whether certain clerical employees will often win the balancing, as in *Rankin*, or whether other higher-level employees will presumptively lose, as in *Rose*. And *Rose* makes clear that the *Pickering* test is still used, and that the rule the Sixth Circuit adopted is simply a way to perform the balancing, not a substitute for it. *Rose*, 291 F.3d at 922–23.

Further, *Rose* did not adopt a bright-line test concerning *all* speech by policymaking employees. The Sixth Circuit requires that the speech must concern policy or political matters for the employer-protection to apply. *Id.* at 923 & n.3. The Circuit explained that where a policymaking employee disagrees with the boss *on policy*, the resulting disruption is *always* enough to tilt the *Pickering* balance against the employee. But, the court reminded, the requirement that the speech must implicate policy was critical, not superfluous, "because it is possible to conceive of situations where the government might terminate an employee for speech *completely unrelated to the working*

relationship and thus would lack" justification. *Id.* at 923 n.3 (emphasis added).

This reservation is similar to one in *Rankin*. There, the Court's approach might seem to insulate most clerical employees' speech within the office, as such speech typically would not be internally disruptive. But the Court expressly reserved room for other categories of cases, in which public speech might injure the employer. "This is not to say that clerical employees are insulated from discharge where their speech, taking the acknowledged factors into account, truly injures the public interest in the effective functioning of the public employer." *Rankin*, 483 U.S. at 391 n.18 (citing case in which a clerical employee in sheriff's office injured employer by announcing the employee's Ku Klux Klan affiliation on television news). Similarly, just as *Rankin* notes that some categories of speech might be unprotected, even by clerical employees, *Rose* notes that some speech by policymaking employees, such as speech that does not reflect a policy issue, might be protected. Thus, as noted above, *Rose* is entirely consistent with, and indeed flows naturally from, *Pickering* and *Rankin*.

Latham also complains that the Sixth Circuit used *Branti*-based concepts in resolving her *Pickering* claim, but that complaint raises no real problems, as the court's use of *Branti* is sensible both doctrinally and pragamatically. As a matter of doctrine, looking to *Branti* is logical because the political affiliation cases, just like the speech cases, involve the identical government interest: the interest in providing efficient government services, which often requires that a management team and certain employees share and support the elected official's policy goals. Regardless of whether that government interest is weighed against an employee's "free speech" interest, or against the employee's "free association" interest, it makes sense to note that evaluation of the government's interest will run the same in either case. If a certain fact pattern does not raise a strong government

interest, then it just doesn't, regardless of what is in the other column. Nor are the employee interests that different. In fact, *Elrod*, the case that first adopted protection for an employee's political affiliation, expressly cited a *Pickering* free speech case as support for the new rule. *Elrod*, 427 U.S. at 358 (citing *Perry v. Sindermann*, 408 U.S. 593 (1972)).

Equally important, aligning the *Branti* and *Pickering* analyses for policymaking employees makes sense for practical reasons. As the Sixth Circuit explained, "it would make little sense to permit the government to preemptively dismiss employees on the basis of political affiliation alone, while restricting its ability to respond to an overt act of disloyalty by an employee in the same position." *Rose*, 291 F.3d at 922. That is, if a *Branti*-exempt employee *could* receive protection under *Pickering* for policy-based speech, then an officeholder would face an odd situation. She may fire all of the silent policymaking employees wholesale on day one of taking office, based solely on political affiliation. But she delays a bit, any employee who starts to loudly complain might be protected, while the still-silent employees in identical jobs remain open to being fired under *Branti*. That would not only be illogical, but it would create a strong incentive for officeholder to exercise *Branti* rights immediately and "clean house" as broadly as the law allows, rather than taking a more flexible approach.

In sum, the Sixth Circuit's approach is reasonable as a matter of "pure *Pickering*" law, and that good sense is further confirmed by the principles animating *Branti*. As the Circuit summed it up,

> In short, the rule we adopt today simply recognizes the fact that it is insubordination for an employee whose position requires loyalty to speak on job-related issues in a manner contrary to the position of his employer, and, as the Supreme Court has recognized, "employees may always be

> discharged for good cause, such as insubordination . . . ." *Elrod*, 427 U.S. at 366. In this situation an individualized balancing of interests is unnecessary.

Id. at 923.

This common-sense notion does not warrant review as a "conflict" with the Court's precedent, and as shown below, no meaningful circuit split exists on this issue, either.

2. The circuits uniformly give great weight to an employee's rank or role in *Pickering* cases, and the minor variations in formulae do not amount to a circuit split.

Latham argues that certiorari is needed here to resolve a "clear and recognized" circuit split over whether an employee's job status may be given conclusive status within the *Pickering* balancing test. She lays out her own taxonomy of how the competing "camps" are aligned, saying that "two general schools of thought" exist, "as well as a number of subcategories, caveats and inconsistencies." Pet. at 16. She takes issue with the implications of some of those "caveats," see, e.g., *id.* at 17 n.8, while she disagrees with other courts over whether this or that court belongs in this or that camp, *id.* at 17 n.9.

The answer to all these quibbles is that Latham simply misperceives the meaning of several courts' holdings, so she sees controversy where none lurks. Properly understood, the circuits all agree on the general principle at issue, and almost all of them agree even on the specifics of the rule to apply. Even more important, though, is that even the court that most clearly "splits" with the Sixth does so in such a marginal way that the split is a purely academic one, which will rarely, if ever, matter in *any* case, and surely not in this one.

While we dispute Latham's classification of several circuits, as detailed below, we agree with Latham's basic

description of the Seventh Circuit as agreeing with the Sixth Circuit, and of the Second Circuit as disagreeing, to some degree, with the Sixth. See Pet. at 16–17. The Seventh Circuit, like the Sixth, applies a rule whereby the employee automatically loses a *Pickering* claim if the employee is *Branti*-exempt, as long as the speech at issue involves policy or politics. *Bonds v. Milwaukee County*, 203 F.3d 969, 977–79 (7th Cir. 2001). And the Second Circuit has, as Latham says, declined to adopt the principle as a dispositive rule. See Pet. at 17–18 (citing *McEvoy v. Spencer*, 124 F.3d 92, 103 (2d Cir. 1997)). But the other circuits do not line up as Latham says, but before detailing those other circuits, it is more important to explain the nature of the disagreement between the Second Circuit and the Sixth, so that the others can be put in better perspective.

The marginal nature of the "split" is best demonstrated by comparing the Second Circuit's approach to the Sixth Circuit's, as all observers categorize the Second Circuit as "opposed" to the Sixth Circuit's approach, and Latham does not identify any other circuit as being "more" hospitable to her position than the Second Circuit is. See Pet. at 17; *McEvoy*, 124 F.3d at 103; *Rose*, 291 F.3d at 921 (describing Second Circuit approach as different). In *McEvoy*, the Second Circuit held that "the policymaking status of the discharged or demoted employee is very significant in the *Pickering* balance, but not conclusive." 124 F.3d at 103. Thus, that court did, to be sure, expressly reject the Sixth Circuit's rule-based approach, under which an employee's status is, indeed, conclusive, at least where the speech concerns policy. But the Second Circuit not only explained that it would give the employee's status "great weight," but it further explained that in its own view, that weight would be so great that it would be conclusive in "most cases," leaving a plaintiff's victory an "unlikely" event in that Circuit:

> Indeed, where the employee holds an extremely confidential or highly placed advisory position, it

> ***would be unlikely*** if the *Pickering* balance were to be struck in his favor. The tremendous disruption to the public workplace likely to result from the critical speech of such an employee would ***in most cases*** outweigh any First Amendment interests possessed by that employee.

Id. at 103 (emphasis added). Thus, all that the Second Circuit has done, in disagreeing with the Sixth, is to leave the door cracked open a bit, allowing a narrow space that the Second Circuit itself sees as probably irrelevant.

Consequently, the issue presented here is an academic debate that may never warrant review. Or, at the very least, the court should await a vehicle where the plaintiff would at least potentially slip through the crack that the Second Circuit allows. This case is not such a vehicle, for, as detailed below in Part B, Latham needs to also persuade the Court to reverse the Sixth Circuit's evaluation of her job as a policymaking one, or the difference between the *Rose* and *McEvoy* approaches does not matter to her.

Moreover, given that the space between even the Second and Sixth Circuits is near zero, it may not matter whether the other circuits agree with the Second or the Sixth. Again, Latham does not suggest that any circuit is more plaintiff-friendly than the Second. Thus, so as long as the Second differs little from the Sixth, it should not matter whether the remaining circuits align perfectly with the Second or Sixth, or land someplace in between, due to some "caveat" or subtlety. Nor should it matter whether the marginally-separated "sides" are aligned four-to-five, or four-to-one. Nevertheless, for accuracy's sake, we explain below how Latham's taxonomy is flawed, as in truth, no other circuit stands with the Second, and the other circuits either agree with the Sixth or have not addressed the issue.

Latham errs in categorizing the First Circuit as agreeing with the Second, when in fact, the First Circuit has plainly

adopted a standard identical to the Sixth Circuit's. See Pet. at 17 & n.9 (citing *Flynn v. City of Boston*, 140 F.3d 42 (1st Cir. 1998)); *Rose*, 291 F.3d at 922 (citing *Flynn* as using same rule as in *Rose*). Latham claims that *Flynn* stops shy of a dispositive rule based on the employee's status, so that the First Circuit's approach tracks the Second Circuit's. But the language in *Flynn* shows that Latham is wrong:

> [W]e think it is a reasonable ***working rule*** that, where the employee is subject to discharge for political reasons under the *Elrod* and *Branti* cases, a superior may also—without offending the First Amendment's free speech guarantee—consider the official's substantive views on agency matters in deciding whether to retain the official in a policy related position. Indeed, ***without this congruence, the latitude allowed to the superior by the Supreme Court could be effectively nullified.***

Flynn, 140 F.3d at 47 (emphases added). As this language demonstrates, the First Circuit adopted a "working rule" in favor of the employer, and it also raised the same common-sense concern that the Sixth Circuit did in *Rose:* that it would make little sense to allow the boss to fire a *Branti*-level employee for being in the wrong party, but not allow the boss to fire that same employee for expressing a disagreeable policy view.

Latham miscategorizes the First Circuit based on her misunderstanding of a key concept, on which the First and Sixth Circuits (and others) *agree fully:* the need to limit the *Rose/Flynn* rule to cases in which the employee's speech actually involves *policy issues*. In *Flynn,* the First Circuit explained that its rule "does not mean that anything goes for policy-related positions: this would be a different case if an executive were fired for reporting a crime or fraud or for expressing adherence to one church or another." 140 F.3d at

47. Latham cites only the first clause in that sentence, in which the First Circuit contrasted the "anything goes" view to its own. Based on that selective snippet, Latham says that the First Circuit "preserve[ed] the balancing test" and rejected a categorical rule. See Pet. at 18 n.9. But what *Flynn* did, just as *Rose* did, was to simultaneously *adopt* a categorical rule for cases involving policy-related speech by *Branti*-level employees, while categorically excluding from that rule those cases in which the speech did not involve policy or political differences, e.g., reporting a crime.[3]

Latham also errs in citing a later First Circuit case, *Padilla-Garcia v. Rodriguez*, 212 F.3d 69 (1st Cir. 2000), as supporting her misreading of *Flynn*. See Pet. at 18 n.8. That later case makes clear that *Flynn* had indeed adopted a mechanical rule against allowing *Pickering* claims, where the speech involves policy, for "policymakers . . . who were also 'subject to discharge for political reasons under the *Elrod* and *Branti* cases.'" *Padilla-Garcia,* 212 F.3d at 79 (quoting *Flynn*, 140 F.3d at 47). The court did not allow the employer

[3] In addition, this same point not only shows why the First Circuit's rule is identical to the Sixth Circuit's, but it also shows why Latham misses the mark in her "separate" argument, in her footnote 8, regarding whether the "policy issue" requirement in *Rose* really means anything. Latham says that *Rose's* "policy issue" requirement is likely meaningless because it probably converges with *Pickering's* initial requirement that an employee's speech must involve a "matter of public concern" to be protected in the first place. Thus, in Latham's view, "any speech worthy of First Amendment protection is effectively subject to the bright line rule adopted by the Sixth and Seventh Circuits," so that the employee loses. But a "policy issue" is *not* the same as a "matter of public concern," as shown by the First Circuit's example of reporting a crime. That would surely involve a public concern, thus triggering *Pickering* protection, but it would not involve a *policy* disagreement, so the employee would not be excluded from protection under *Flynn* in the First Circuit, or under *Rose* in the Sixth, or under *Bonds* in the Seventh. Thus, Latham's complaint about this "wrinkle," in footnote 8, and her dispute the proper categorization of the First Circuit, in footnote 9, cancel each other out.

in *Padilla-Garcia* to take advantage of the *Flynn* rule for the simple reason that the employer *waived the issue below:* "it is fatal to the appellees' position that they did not argue before the district court that Padilla-Garcia[] . . . was a policymaking or confidential official subject to termination for her political views under the *Elrod/Branti* exception." *Id.* Thus, Latham's suggestion that *Padilla-Garcia* "confirms [her] reading of *Flynn*" is surely mistaken. See Pet. at 18 n.9.

Latham's parade of miscategorization marches on, as she also places the Third, Fifth, and Tenth Circuits all in her favored "camp," along with the Second, of rejecting the Sixth Circuit's view. None of those three courts has squarely aligned itself with the Second Circuit's rejection of the Sixth/Seventh view, and in fact, all have suggested, to some degree, that they agree with the Sixth and Seventh Circuits.

The Third Circuit leaned heavily in the Sixth Circuit's direction, but without clear resolution, in *Curinga v. City of Clairton*, 357 F.3d 305 (3d Cir. 2004). In *Curinga*, the court said that "[n]ot only the [*Pickering*] balancing, but the *outcome* as well, *may be inevitable* because the public employer's interest may weigh so heavily that no other outcome is possible." *Id.* at 312 (emphasis added). And noting the *Rose* decision, the Third Circuit said that "[w]hether or not this can be decided as a matter or law, the government's interest in these kinds of cases is likely dispositive." *Id.* at 312 n.5. Thus, the Third Circuit is probably best categorized as on the fence, as it agrees that the government interest is "likely dispositive," but still refers to "whether or not" this tilt can be embodied as a "matter of law." The "whether or not" shows that it has not yet joined the Second Circuit in disclaiming the adoption of a rule. (And of course, as noted above in our discussion of the

Second Circuit, even *that* view differs only at the extreme margin, if ever.)[4]

The Fifth Circuit's view seems similar to the Third's, i.e., leaning heavily, but not committed:

> In determining where this case should fall, in order to formulate and apply the proper balancing, we note that cases involving public employees who occupy policymaker or confidential positions fall much closer to the employer's end of the spectrum, where the government's interests more easily outweigh the employee's.

Kinsey v. Salado Indep. Sch. Dist., 950 F.2d 988, 994 (5th Cir. 1992). Thus, while it speaks of a spectrum, it perhaps leaves room for a line at the far end of the spectrum, so that it might join the Sixth Circuit. But *Kinsey* does not reject having a line, as *McEvoy* does.

Latham aligns the Fifth Circuit with the Second on the basis of a different case, *Gentry v. Lowndes County*, 337 F.3d 481 (5th Cir. 2003), but *Gentry* does not commit to the Second Circuit's view. *Gentry* repeats *Kinsey's* teaching, and more important, *Gentry* dealt primarily with what the court called a "hybrid" case of speech and political affiliation, not a pure speech claim. The court mostly discussed the plaintiffs' activity in campaigning against their boss, which is a political activity/affiliation claim; while as to the pure *Pickering* claim that also existed in *Gentry*, the court simply

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[4] Latham also misconstrues *Curinga* in another respect. Latham cites that case as purportedly noting a circuit split and as grouping the circuits into two camps. See Cert Pet. at 15–16. But that discussion in *Curinga*, and that grouping of the circuits, did not concern the issue presented here, regarding the reference to *Branti*-exempt status in resolving a *Pickering* claim. Rather, *Curinga* there described a split over an antecedent question regarding whether a pure *Branti* approach, or *Pickering* instead, governed those cases in which employees campaign against their officeholder-employers. See *Curinga*, 357 F.3d at 313 n.8. That distinct issue is not raised here.

remanded to first resolve several other *Pickering* issues. *See id.* at 489.

The Tenth Circuit did announce its position in *Barker v. City of Del City*, 215 F.3d 1134 (10th Cir. 2000), as Latham cites, but the court there did not side with the Second Circuit, and in fact, it suggested that it would agree with the Seventh:

> We agree with the Seventh Circuit that, "although an employee's status as a policymaker bears considerable attention when weighing the interests of the government, the policymaking employee exception does not apply and courts must apply *Pickering* balancing when the speech at issue does not implicate the employee's politics or substantive policy viewpoints."

Id. at 1139 (quoting *Bonds*, 207 F.3d at 979). The *Barker* court did not apply a per se rule against the employee in that case, however, because the employee's speech **was not related to policy** or politics:

> Accordingly, in this case, a *Pickering/Connick* analysis could appropriately be applied to Ms. Barker's speech on a matter of public concern *unrelated to her politics or substantive policy positions*, even though she is also a policymaking employee to whom the *Elrod/Branti* line of cases applies."

Id. (emphasis added). Thus, the Tenth Circuit did not, as the Second Circuit did, reject the idea of adopting a rule like *Rose*. To the extent that it stated its agreement with the Seventh, and slotted the employer in *Barker* under pure *Pickering* because her speech was *not* policy-related, the Tenth Circuit is in line with the Sixth and Seventh. Indeed, that is how the Sixth Circuit viewed the Tenth. *Rose*, 291 F.3d at 921–22.

On the "other" side, we agree with Latham that the Seventh Circuit's view is identical to the Sixth's, but we disagree with her placement of the Fourth and Ninth, although that disagreement does not affect Latham's argument for review. As for the Ninth, that court is actually *more* employer-protective. *Id.* at 922. The Ninth Circuit's view in *Fazio v. City and County of San Francisco*, 125 F.3d 1328 (9th Cir. 1997), gives the public employer an automatic win *whenever* a *Branti*-exempt employee files a *Pickering* claim; the Ninth Circuit did not add the caveat that the speech must involve policy. *Id.* at 1331–32. Of course, the Ninth Circuit may have skipped that caveat because it did not have such a non-policy case before it, so perhaps that exception-to-the-exception will arise later. But that difference does not help Latham, for, since she loses under the Sixth Circuit rule, she can have no stake in a battle between one view that defeats her claim and another that is even more employer-deferential.

As for the Fourth Circuit, the case that Latham cites does not in any way discuss how to evaluate a *Pickering* claim, whether based on employee status or any other issue. See Pet. at 16 (citing *Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. 1997) (en banc)). The court there treated a certain claim as a pure *Branti* claim, and did not resolve the claim as a *Pickering* claim at all. See *id.* at 1160 ("The deputies' complaint is properly analyzed under" *Elrod* and *Branti*); *id.* at 1165 (Gribbon Motz, J., dissenting) ("The majority . . . ignores altogether the *Connick-Pickering* claim.").

In sum, the split that Latham describes does not exist. She does not have several circuits on "her" side, just the Second Circuit, and even that view would not help her cause. As the Second Circuit made clear, few if any *Branti*-exempt employees will ever have a *Pickering* claim in the Circuit. But Latham's real complaint, as explained in Part B below, is not whether *Branti*-level employees automatically lose, or just almost-definitely lose—her real complaint is that she was

ever categorized as such an employee. And that, as shown below, it not a certworthy issue, either.[5]

B. Latham's real complaint is not whether the proper rule is a "pure" balancing test or a categorical approach based on an employee's role; her real dispute is how her job was categorized, and that issue is not certworthy.

At the end of the day, Latham's real complaint is not with the Sixth Circuit's adoption of the *Rose* rule, but with the decision it made regarding her status as a policy-making employee. That is, her dispute is not over whether *Branti*-exempt employees should *automatically* lose on *Pickering* claims (when they speak on policy issues), or whether such employees should merely face a very uphill battle, as in the Second Circuit. Rather, her dispute is over whether her position as an Assistant Attorney General should be viewed as *Branti*-exempt, and thus whether she is over the line that *Rose* drew. Or, put another way, if she could persuade the Court to adopt the Second Circuit's *McEvoy* approach, she would still lose—because her status as a confidential, policy-making employee would carry overwhelming weight—unless she could also persuade the Court to reverse the Sixth Circuit's determination regarding her status.

Thus, Latham's real question presented seems to be "whether an assistant attorney general serves in a confidential or policymaking role, or is like a clerical worker." Or, as our second question presented asks, is an "assistant attorney

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[5] Nor does it matter that the district court initially denied summary judgment for the defendants, and granted summary judgment after *Rose*. The earlier denial of summary judgment did not at all deal with the issue of Latham's status and its effect on the *Pickering* balance. Rather, that denial dealt with issues such as whether her speech raised a matter of public concern, whether she was fired for other reasons anyway, and whether her speech was disruptive (based on its content, not her status). And any difference in approach between the district court and the circuit is of course not certworthy.

general, who speaks for the Attorney General in court and assists the Attorney General in implementing public policy, a confidential or policymaking employee." *That* question does not warrant review, either, for several reasons.

First, the circuit courts are virtually unanimous in finding that government lawyers, at least those who represent the State's interests, are "confidential" or "policymaking" employees.[6] The only clear exception is for public defenders who, unlike Latham, mainly represent the interests of their individual clients, not the interests of their government employers. *Branti v. Finkel*, 445 U.S. 507 (1980) (public defender); *Kurowski v. Krajewski*, 848 F.2d 767 (7th Cir.) (assistant public defenders). Aside from the public defender cases, the only disagreement comes from two district court decisions rendered more than 20 years ago involving social service attorneys.[7] While Latham cites different formulations that the circuits use, those formulas are substantially similar in general, and are particularly convergent when it comes to classifying government lawyers such as Latham.

Nor can Latham draw support from the fact that *Connick* involved an Assistant District Attorney. See Pet. at 10. That is because the Court resolved *Connick* primarily upon the grounds that the speech there, for the most part, did not involve a matter of public concern, but was "most accurately characterized as an employee grievance concerning internal office policy." *Connick*, 461 U.S. at 154. To the extent that the speech there marginally touched on

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[6] *Collins v. Voinovich*, 150 F.3d 575, 578 (6th Cir. 1998) (assistant in-house counsel for the Ohio Lottery Commission); *Adler v. Pataki*, 185 F.3d 35, 46 (2d Cir. 1999) (in-house counsel); *Americanos v. Carter*, 74 F.3d 138, 141–42 (7th Cir.) (deputy attorney general); *Bauer v. Bosley*, 802 F.2d 1058, 1062 (8th Cir. 1986) (staff attorney for elected county clerk of court); *Fazio*, 125 F.3d at 1334 (assistant district attorney).

[7] *Tavano v. County of Niagra*, 621 F. Supp. 345 (W.D.N.Y. 1985), *aff'd*, 800 F.2d 1128 (2nd Cir. 1986) (table) (assistant county attorney); *Layden v. Costello*, 517 F. Supp. 860 (N.D. N.Y. 1981) (in-house attorney).

public concerns, the Court rejected the claim based on the disruption it caused and the harm to close working relationships. See *id.* Thus, Latham has not cited cases in which government attorneys succeed in maintaining *Pickering* claims.

Therefore, Latham's argument that she is not a *Branti*-exempt "confidential" employee, while essential to the ultimate success of her claim, does not warrant review. Moreover, if Latham were somehow right she is *not* "confidential," then the Sixth Circuit's own *Rose* rule would no longer prevent her from recovery on her claim. But in that case, Latham's questions regarding the *adoption* of *Rose,* as opposed to its *application* to her, would not even be truly presented in her case. Thus, although she raises academically interesting points, at the end of the day, her *Rose* questions mean nothing unless she *also* wins the issue of re-categorizing her job, but if she does succeed at the latter, then she no longer raises the *Rose* question. Thus, review is not warranted.

C. The pending *Garcetti* case provides no reason to grant *certiorari* here.

Latham also says that the Court should grant review here so that her issues may be presented as a companion to, or a followup to, the Court's pending case of *Garcetti v. Ceballos*, No. 04-473. *Garcetti* addresses the first part of the *Connick-Pickering* analysis, i.e., what types of employee speech can be a matter of public concern to trigger *Pickering* protection—an issue that precedes application of the balancing test. *Garcetti* asks whether speech relates to a matter of public concern under *Connick,* when the employee's speech was uttered "as an employee" in the course of carrying out assigned duties, rather than "as a citizen." *Ceballos v. Garcetti*, 361 F.3d 1168 (9th Cir. 2004).

But *Garcetti* gives no reason to grant *certiorari* here. In *Garcetti,* the Ninth Circuit never reached the *Pickering*

balancing, as it dealt solely with the threshold issue of whether the employee's speech was a matter of public concern. So, at *best* for Latham, a pro-employee decision in *Garcetti* will not help her, other than to confirm the Sixth Circuit's determination on the public concern issue.[8] And if the Court resolves *Garcetti* against the employee there, that might provide yet another ground to *reject* Latham's claim. Latham spoke in the course of her employment, on matters in which she could be expected to report her views to her bosses. Thus, *Garcetti* offers no reason to *grant* review here. But, if the Court is inclined to consider granting, then *Garcetti* is a reason to hold the case rather than grant now, as a *Garcetti* ruling could undermine Latham on the "public concern" issue, making the issues in the Petition irrelevant.

CONCLUSION

The Petition should be denied.

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[8] Nor can *Garcetti*, merely because it involves a government lawyer, be read as implicitly raising the issue of whether public lawyers are *Branti*-exempt, and thus conflicting with the Sixth Circuit's approach. The *Garcetti* issue comes logically before the *Pickering* balance, so the Ninth Circuit has never held that the lawyer in *Garcetti* would survive that next stage. And under *Fazio*, the lawyer's claim likely would not survive.

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In the Supreme Court of the United States

MARY PATRICK LATHAM,

Petitioner,

v.

THE OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF OHIO, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

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I. Introduction

Respondent acknowledges the clear split among the circuits but attempts to downplay its significance through a selective harmonization of the rationales employed by the courts of appeals. Despite this effort, the split among the circuits is deep and clear, leaving the courts in disarray and public employees across the country, uncertain whether they may safely speak out on matters of public concern without fear of retribution because it is entirely unclear who is a "policymaking" or "confidential" employee and how that determination is to be made. Indeed, only five years ago, before the Sixth Circuit's decision in *Rose*, Respondent herein argued that the circuit split was "sharp" and "deep" when it was urging this Court to grant certiorari from a Sixth Circuit decision applying *Pickering*. Only a decision from this Court can resolve this issue. The *Garcetti* case currently before the Court does not present this issue, whereas it is the sole issue presented in this case.

II. Discussion

A. Respondent's Effort To Harmonize The Split Among The Courts of Appeals Ignores The Actual Effect Of The Conflicting Views Announced By The Courts – Different Outcomes In Similar Cases.

Respondent devotes the bulk of its brief – 15 out 18 pages of argument – to explaining why, in its view, the recognized split among the circuits is not terribly significant. To get where it wants to go, Respondent picks and chooses select elements from the decisions of this Court and from the statements of the courts of appeals to weave a complicated but, according to respondent, coherent and unified jurisprudence of public employee First Amendment rights.

To be fair, it is true that the courts have consistently held that the nature of a public employee's job is an important element to be considered in employing the balancing test mandated by *Pickering*. Petitioner does not take issue with this principle. Indeed, the district court applied the *Pickering* balancing test in this case before the Sixth Circuit's decision in *Rose* and easily denied Respondent's motion for summary judgment holding that Ms. Latham's letter was Constitutionally protected speech because it touched on matters of public concern, and that, on the record presented, it could not be held as a matter of law that any alleged disruption it caused in the Attorney General's office outweighed the speech rights at issue. The problem is that *Rose* and the other circuits adopting its bright-line test have not merely expanded on or refined *Pickering*, they have obliterated it by eliminating the need to engage in the case-by-case balancing process mandated by that decision in any case in which the label "policymaking" or "confidential" can be applied. Moreover, these courts have actually compounded the problem by failing to delineate any clear standard by which a public employee can discern whether he or she is such an employee, thereby creating a *de facto* deterrent to public employee speech for the many employees uncertain of whether they fall within the hazy realm of "policymaking" or "confidential" as defined by his or her particular circuit.

The history of this case illustrates the fallacy of Respondents' argument. Before *Rose* the case was going to trial following a denial of summary judgment under the well established doctrine announced in *Pickering*. After *Rose*, and on the eve of trial, the district court felt compelled to grant a last minute motion for summary judgment solely because of the change in the law announced in *Rose*. Same case - different outcome *as a matter of law* - this cannot be fairly downplayed as nothing "novel or exceptional" as contended

by Respondents. The same is true in other circuits as noted by four members of the Fourth Circuit:

> In addition to refusing to engage in the proper *Elrod-Branti* analysis and finding *all* (more than 4,600 in 1988) North Carolina deputy sheriffs are policymakers, the majority ignores the deputies' potentially meritorious claim under *Connick* and *Pickering*. Taken together, these holdings make the hiring, firing, promotion, and transfer decisions of North Carolina sheriffs essentially unreviewable.

Jenkins v. Medford, 119 F.3d 1156, 1171 (4th Cir. 1997) (Motz, J., dissenting from *en banc* opinion joined by Judges Hall, Murnaghan and Michael) (emphasis and elipsis in original).

The Attorney General's effort to minimize the significance of the split among the circuits in this case is belied by its own arguments in support of certiorari in a pre-*Rose* decision in which it claimed that "the circuits are sharply divided on the application of *Pickering* to high level public officials." *See* Petition for Writ of Certiorari in *Johnson v. University of Cincinnati*, S.Ct. Case. No. 00-577, October 13, 2000, 2000 WL 34000722 * 11. In *Johnson v. University of Cincinnati*, 215 F.3d 561, 583-85 (6th Cir. 2000), the Sixth Circuit applied *Pickering* and held that a university vice president could maintain a First Amendment retaliation claim. In urging this Court to grant a writ of certiorari, the Attorney General of the State of Ohio, a respondent herein, argued that "the federal courts are deeply divided concerning the proper test to apply in a case like this one, where a high-level or confidential public employee is dismissed for criticizing the agency's implementation of its own policies." *Id.* Indeed, according to Respondent, "resolution of this circuit conflict"

was "necessary to uphold the authority of public agencies to dismiss senior administrators who disagree with their agencies on policy matters." *Id.* at * 16. Now that the Sixth Circuit has adopted the rule Respondent was urging upon the Supreme Court in 2000, the circuit split which it described then as "sharp" and "deep" is evidently not so significant. To the contrary, however, the situation has not changed since then with the exception of the Sixth Circuit's decision to join the Seventh and Ninth Circuits in adopting a categorical, bright-line rule in *Rose*.

Respondent completely declined to address the deterrent effect that the new rule announced in *Rose* and by other circuits will have on public employee speech. Indeed, Respondent does not even discuss the Court's decision in *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454 (1995). Not surprisingly, however, public employers have already begun to attempt to use the bright-line rule as a weapon to justify overt prior restraints on public employee speech. *See Wernsing v. Thompson*, ___ F.3d ___, 2005 WL 2174432 *11 (7th Cir., September 9, 2005).[1] Equally or perhaps more invidious is the deterrent to speech that exists under the current state of the law because public employees are left to wonder whether they are "confidential" or "policymaking" employees who can be fired at will for utterances, even constructive private ones such as those at issue in this case, dealing with matters of policy. The understandable result is that employees who are uncertain of

[1] In *Wernsing*, the Illinois Inspector General's office issued a memo advising several employees who had expressed concern about a proposed appointment that they could not communicate with anyone outside the office about matters of policy without prior approval. When the employees inquired about the scope of the restriction, their jobs were threatened. *Id.* *3.

where they stand will remain silent, and there is tremendous confusion about who is a "policymaker" or "confidential" employee. *See e.g. Velez v. Levy*, 401 F.3d 75 (2d Cir. 2005) (holding that board member was not a "policymaker" or "confidential" employee); *Kiddy-Brown v. Blagojevich*, 408F.3d 346 (7th Cir. 2005) (holding that whether position was "confidential" or "policymaking" was fact driven decision); *Jenkins*, supra at 1171 (noting uncertainty of status of thousands of law enforcement officers). If a rule such as that adopted by the Sixth Circuit in *Rose* is to be the law of the land, guidance from the Court is needed to determine to whom it applies. Otherwise, public employers are free to try to mute their employees by applying the "confidential" and "policymaking" labels.

B. Contrary To Respondents' Argument, Petitioner's "Real Complaint" Is Not "How Her Job Was Categorized," But Rather How The Law Was Changed By The Sixth Circuit And Others To Allow Public Employers To Silence And Punish Well Meaning, Dedicated Public Servants Such As Ms. Latham With Impunity.

Respondent tries to marginalize Ms. Latham's arguments by recharacterizing them as an isolated dispute over whether Ms. Latham's position as the lowest ranking professional staff member of the Attorney General's office was properly included within the "confidential" or "policymaking" categories. This misstates the issue. Even taking into consideration the fact that Ms. Latham is an attorney, the district court concluded prior to *Rose* that the balancing required by *Pickering* could not be resolved *as a matter of law* given the value properly accorded her Constitutionally protected speech. Ms. Latham's "real complaint" is that *Rose* changed the law in the Sixth Circuit and made the issue,

which was previously unresolvable as a matter of law because it was bound up with factual determinations, a pure issue of law dictated by the labels purposefully applied by employers without any reference to reality. Ms. Latham's "real complaint" is with the tremendous impact that such a rule of law has on public employees everywhere, herself included, and the loss that we all suffer when well meaning public employees are afraid to speak up about matters of public concern like public safety and corruption.

III. Conclusion

Respondents' effort to downplay what it previously described as a "sharp" and "deep" split among the circuits is convenient now that the Sixth Circuit has adopted the rule it prefers. In reality the split endures and remains "sharp" and "deep." As a result, the law is inconsistent across the country and the free speech rights of public employees have been chilled because employees cannot possibly be expected to determine where they stand, a situation public employers are apt to exploit. The Court's resolution of the issues raised by this case is needed to bring consistency and uniformity to this important area of the law.

Respectfully submitted,

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